Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

J.A. CROSON COMPANY,

Petitioner,

v.

CENTRAL OHIO JOINT VOCATIONAL SCHOOL DISTRICT, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The Court Of Appeals Of Ohio Twelfth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Ohio prohibits collusion among bidders on public construction contracts. Similarly, pursuant to a non-collusion affidavit, the Respondent Central Ohio Joint Vocational School District prohibits collusion among bidders for its own construction contracts. Petitioner J.A. Croson Company has alleged that Respondent Fox Mechanical Company colluded with other union contractors and a local union by participating in a union job targeting program with respect to a public construction contract for the Respondent School District.

The Court of Appeals of Ohio, Twelfth Appellate District, contrary to federal precedent, determined that both the State's prohibition of collusion on state contracts as well as the School District's prohibition against collusion on contracts for which it is a market participant were preempted by federal law under the National Labor Relations Act.

The questions presented are:

A. Whether a State court can declare anti-collusion bidding statutes and bid specifications in a public contract preempted by the National Labor Relations Act because of a job targeting program in a union contract?

B. Whether the National Labor Relations Act denies a State and local School District the right to prohibit collusion among any and all bidders for a contract for which the State and School District are serving their own proprietary interests?

PARTIES TO THE PROCEEDING

The parties to the proceedings below and before this Court are the Petitioner, J.A. Croson Company,[1] and the Respondents, Central Ohio Joint Vocational School District and Fox Mechanical Company.

The Ohio State Building & Construction Trades Council and Plumbers & Pipe Fitters Local 189 participated as *amicus curiae* in the proceedings below.

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[1] Petitioner J.A. Croson Company has no parent or subsidiary company.

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The Petitioner J.A. Croson Company respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Ohio, Twelfth Appellate District, which entered its Decision on May 30, 1995. On October 18, 1995, the Supreme Court of Ohio declined jurisdiction to hear Petitioner J.A. Croson Company's discretionary appeal.

OPINIONS BELOW

In this matter, there are four unreported decisions and/or orders from the state courts below, each of which is reproduced in the accompanying appendices. The April 11, 1994, Decision and Entry of the Court of Common Pleas, Madison County, Ohio on Petitioner J.A. Croson Company's motion for temporary restraining order is reproduced as Appendix B. (App. 10a). The June 9, 1994, final Decision and Entry of the Court of Common Pleas, Madison County, Ohio is reproduced in Appendix C. (App. 22a). The May 30, 1995, Opinion of the Court of Appeals of Ohio, Twelfth Appellate District, is reproduced in Appendix A. (App. 1a). Lastly, the October 18, 1995, Decision of the Supreme Court of Ohio on Petitioner J.A. Croson Company's appeal and memorandum in support of jurisdiction is reproduced in Appendix D. (App. 24a).

JURISDICTION

The judgment of the Court of Appeals of Ohio, Twelfth Appellate District, was entered on May 30, 1995, affirming the dismissal of Petitioner's complaint. The

Supreme Court of Ohio declined jurisdiction to hear the case on October 18, 1995.[2]

Pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States, J.A. Croson Company has filed this Petition for Writ of Certiorari within 90 days after the entry of the Supreme Court of Ohio's order denying discretionary review.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . .

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, is reproduced at Appendix I. (App. 65a).

Additionally, 28 U.S.C. § 1257(a) ("State courts; certiorari"), provides as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of

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[2] The State of Ohio has established the equivalent of a certiorari procedure whereby the Supreme Court of Ohio, the court of last resort, may in its discretion decide to review the judgment of a lower state court.

> its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Finally, Ohio Revised Code § 3313.46, Ohio's statute that prohibits collusion on bids for state contracts, reads in pertinent part, as follows:

> (A) In addition to any other law governing the bidding for contracts by the board of education of any School District, when any such board determines to build, repair, enlarge, improve, or demolish any school building, the cost of which will exceed twenty-five thousand dollars, except in cases of necessity, or for the security and protection of school property . . . all of the following shall apply:
>
> . . . .
>
> (9) When there is reason to believe there is collusion or combination among the bidders, or any number of them, the bids of those concerned therein shall be rejected.

STATEMENT OF THE CASE

In February 1994, Respondent Central Ohio Joint Vocational School District (the "School District") solicited proposals for labor and materials for a construction project known as the Tolles Technical Center Expansion (the "Project"). Six contractors submitted bids to perform the work on the Project, three of which were non-union contractors while the other three were union contractors. Two of the construction companies to submit bids were

Petitioner J.A. Croson Company ("Croson") and Respondent Fox Mechanical Company ("Fox"). Both Croson and Fox are construction companies with operations throughout the State of Ohio, however, Croson is a non-union contractor while Fox is a union contractor.

As with at least twenty-one other states in the United States, Ohio has passed specific legislation prohibiting collusion on bids for state contracts.[3] The particular piece of legislation at issue in Petitioner's complaint is Ohio Revised Code § 3313.46. In general, the statute prohibits collusion among bidders for school district construction contracts.

Similarly, in order to ensure the fairness of bids on its own Project, the School District required as a bid specification that each bidding company agree to a "non-collusion affidavit." Through the affidavit, each company promised that its bid was "not collusive" and that they had not agreed with any other person or entity to fix the bid or any element of the bid price. (App. 36a). In effect, each company agreed not to share any information with any other person or entity in order to prepare bids for the Project.

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[3] Ala. Code § 41-16-25; Alaska Stat. § 36.30.920; Ariz. Rev. Stat. Ann. § 34-253; Ark. Code Ann. § 19-11-240; Cal. Public Contract Code § 7106; Colo. Rev. Stat. § 29-92-113; Conn. Gen. Stat. Ann. § 31-57c; Haw. Rev. Stat. § 103D-319; Ill. Ann. Stat. ch. 65, § 5/8-10-8; Ind. Code Ann. § 4-1-5-3; Ind. Code Ann. § 24-1-2-4; Kan. Stat. Ann. § 75-3741; Ky. Rev. Stat. Ann. § 45A.325; La. Rev. Stat. Ann. § 39:1626; Mont. Code Ann. § 18-4-141; Nev. Rev. Stat. § 332.165; N.Y. General Municipal Law § 103-d; N.C. Gen. Stat. § 143-54; Okla. Stat. Ann. tit. 74, § 115; 73 Pa. Cons. Stat. § 1617; R.I. Gen. Laws § 37-2-36; Utah Code Ann. § 63-56-33.

Prior to submitting its bid on the Project, Respondent Fox and several other union contractors used the services of the local union's "job targeting program."[4] In its essential form, the job targeting program operates when union contractors bidding on a project share information about their own estimate of the cost and man-hours necessary for a construction project. The union contractors share this information through the local union. After the union contractors provide the local union with their estimates, the local union tells the union contractors that it will contribute a specified amount of money to the union contractor who successfully bids on the contract. Significantly, the amount of the local union's subsidy is communicated to the union contractors *before* the union contractors submit their bids.

Consequently, every *union* contractor who participates in the job targeting program receives information about other union contractors' bids and can lower the amount of their own bids by the amount of the local union's subsidy that constitutes a fixed element of the bid price.[5] Thus, the job targeting program operates only if the union contractors collectively funnel their estimates to the local union. With the shared information, the union provides a specified subsidy to those who cooperate, and those in the group can all lower their bids by the amount

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[4] For a more detailed explanation of "job targeting programs" *see* Herbert R. Northrup and Augustus T. White, *Subsidizing Contractors To Gain Employment: Construction Union "Job Targeting,"* 17 U. C. Berkeley J. of Employment & Labor Law (forthcoming January 1996) (App. 66a).

[5] Because this was a prevailing wage job, all union contractors had a competitive advantage over non-union contractors whose labor rates are *fixed* by statute.

of the agreed upon subsidy.[6] Furthermore, with this shared information, the union contractor can now estimate the bid information supplied by the other union contractors.

Moreover, the reduction of these labor rates for union contractors has placed all non-union contractors at a competitive disadvantage by fixing a price element of the bid in violation of the School District's non-collusion affidavit. Non-union contractors are required to pay a mandated fixed price for labor, but due to the kick-back from the union through the job targeting program, the union contractors have a lower fixed labor cost. In fact, the trial court in this matter found the following facts:

> Plaintiff complains and the arguments herein support that job targeting now gives the union contractor a *competitive advantage* because the union provides a *kick-back* from wages to reduce the hourly rate actually paid to laborers.

J.A. Croson Co. v. Central Ohio JVSD, No. 94CV-03-039 (Ohio C.P. Madison County June 8, 1994) (App. 15a-16a) (emphasis added).

Respondent Fox participated in the job targeting program of the Ohio State Building & Construction Trades Council and Plumbers & Pipe Fitters Local 189 ("Local 189").[7] With the assistance of the job targeting program, and with the subsidy from Local 189, Fox submitted a bid that was merely $15,549 lower than Petitioner's bid on a project that cost nearly $300,000. Croson was the second

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[6] Incidentally, the money for the local union's subsidy comes from mandatory assessments taken from workers' paychecks.

[7] Local 189 participated as *amicus curiae* in the proceedings below.

lowest bidder on the Project. But for the subsidy from Local 189 to Fox, Croson would have been the lowest bidder on the Project.

After the School District awarded the Project to Fox, Croson filed this action against the School District in the local state court, the Court of Common Pleas, Madison County. Croson alleged, among other things, that the School District should not have awarded the work for the Project to Fox because Fox had colluded with others in violation of state law and the non-collusion affidavit.[8] Croson sought injunctive relief, a writ of mandamus, and declaratory judgment. Croson then filed a motion to amend its complaint to more definitely set forth the allegations of collusion. (App. 25a).[9]

In their answers to Petitioner's complaint, Respondents asserted, among other things, the affirmative defense of federal preemption. Additionally, the Respondent School District argued in a motion to the trial court that Petitioner's efforts to enforce Respondent's non-collusion affidavit and the applicable state law were preempted by § 302(C)(4) of the Labor Management Relations Act ("LMRA"). In rejecting Petitioner's request for injunctive relief, the trial court decided that "it is probable" that preemption under § 302(C)(4) of the LMRA would apply.

Croson appealed the trial court's decision to the Court of Appeals of Ohio, Twelfth Appellate District.

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[8] Fox filed a motion to intervene in the action on March 28, 1994.

[9] Croson filed a motion to amend its complaint to provide more specific details with respect to its allegations of collusion. The trial court, having found this case preempted, denied the motion to amend the complaint.

Among the assignments of error Croson presented to the court of appeals, Croson specifically asserted that "[t]he trial court erred in finding that [Petitioner] Croson's claims were preempted by federal law."

In its decision, the court of appeals did *not* find that preemption under § 302(C)(4) of the LMRA was applicable. Instead, the court of appeals looked to Section 7 of the National Labor Relations Act ("NLRA"). Concluding that Section 7 of the NLRA applied to Petitioner's claim that participation in a job targeting program constituted impermissible collusion, the court referred to this Court's decision in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). In particular, the court of appeals relied upon the portion of this Court's opinion in *Garmon* wherein the Court explained that:

> [w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act, . . . due regard for federal enactment requires that state jurisdiction must yield.

J.A. Croson v. Central Ohio JVSD, No. CA94-07-026 (Ohio App. 12th Dist. May 30, 1995) (App. 5a-6a) (quoting 359 U.S. at 244). Concluding that Ohio Revised Code § 3313.46 and the Respondent School District's non-collusion affidavit regulated an activity that was protected by Section 7 of the NLRA, the court of appeals decided that Petitioner's claims were preempted. The court of appeals explained its decision as follows:

> Application of [Ohio Revised Code] 3313.46 in this case would allow a state court to regulate the procedure by which a union administers job targeting. In denying Croson's motion for a temporary restraining order, the trial court did not err in finding that Croson's state law cause of action would be preempted because it involves

> activity arguably protected under Section 7 of the NLRA.

Id. (App. 8a-9a). Having found that Ohio Revised Code § 3313.46 and the School District's non-collusion affidavit were preempted, the court of appeals declined to address Petitioner's remaining assignments of error, one of which was the denial of the motion to amend the complaint.[10]

REASONS FOR GRANTING THE WRIT

The National Labor Relations Act permits property owners who are developing their property to disqualify all contractors who collude with others to receive the work. Neither the NLRA nor any judicial or administrative decision prohibits a private property owner from enforcing this prohibition.

The state appellate court below, however, held that the State's prohibition against collusion on the State's own contracts falls within Section 7 of the NLRA. (App. 8a-9a). The state court effectively held that the NLRA denies the owners of *public* property the privileges that the NLRA reserves for the owners of *private* property, even where the public and private entities are acting in an identical fashion as the owner of the property to be improved.

In order for there to be preemption under *Garmon, supra,* the cause of action must in some way attempt to regulate activity protected by Section 7 of the National

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[10] The court of appeals noted that pursuant to this Court's decision in *Longshoreman v. Davis,* 476 U.S. 380, 391 (1986), "[i]f there is preemption under *Garmon,* then state jurisdiction is extinguished."

Labor Relations Act or constitute an "arguable" unfair labor practice. With respect to the claim that job targeting involves rights protected by Section 7 of the Act, two federal courts of appeals (District of Columbia Circuit and Ninth Circuit) have held that deductions for job targeting money is *illegal*. While both courts found the deduction to be illegal under the federal Davis Bacon Act, *as amended*, 40 U.S.C. § 276 et seq., this Court has held that *Garmon* preemption applies to federal courts as well as to state courts. In the Ninth Circuit, the court specifically held that there was no preemption under the National Labor Relations Act.

Furthermore, if a matter of collusion among the bidders on public contracts is not something that touches matters deeply rooted in local interests, Croson is at a loss to figure out what would. In addition, the issue presented to the trial court below was not an issue that would be identical to any issue presented to the National Labor Relations Board. Moreover, this Court has held that states have a right to set minimum labor standards which are not preempted. As two federal courts of appeals have held that job targeting deductions violate the Davis Bacon Act, it is just as likely that in Ohio these deductions would violate Ohio's prevailing wage law—that is, of course, if the State of Ohio courts did not erroneously hold that *any* challenge to these deductions under Ohio law was preempted under *Garmon* in which the courts totally ignore a State's right to set minimum labor standards.

The court below reached its errant result by corrupting the considered balance in the federal system and the established jurisprudence of preemption. Having *assumed*

that Ohio's prohibition against collusion on its own contracts collided with the protections under Section 7 of the NLRA—without reference to or support from any portion of the NLRA or any decision interpreting the NLRA—the lower court has stripped the State and the School District of their right to manage proprietary interests on the same level as a private party. Occasionally, Congress has imposed the *same* restrictions on state and private economic actions, but there is no discernible instance in which Congress has constrained the proprietary interests of the States alone. There certainly is no evidence that the NLRA is such an extraordinary piece of legislation. In fact, the NLRA specifically *excludes* "any State or political subdivision" of the State from the NLRA's regulatory scheme. 29 U.S.C. § 152(2).

The decision below does not represent an isolated and theoretical mistake that will fade away. Rather, the decision below directly defeats the ability of the State of Ohio to control the manner and procedures by which it oversees thousands of public construction contracts involving billions of dollars and untold man-hours. The controls the State places on its own contracts to prevent fraud and favoritism and to promote fairness and honest competition are useless in the face of the lower court's decision, and the consequent impact on the State is immediate and potentially devastating.

The lower court's decision has already received national attention, and the potential for its influence to infect other state courts increases daily. In their law review article, *Subsidizing Contractors To Gain Employment: Construction Union "Job Targeting,"* 17 U. C. Berkeley J. of Employment & Labor Law (forthcoming January 1996) (App. 66a), Professor Herbert L. Northrup and Augustus

T. White cover, in part, the lower court's decision in the context of job targeting programs. In fact, the impact of the various decisions in this case have already been felt in another state court decision out of Ohio.[11] In *J.A. Croson Co. v. J.A. Guy*, No. 93-CI-000094 (Ohio C.P. Pickaway County Mar. 27, 1995) (App. 48a), the court cited to the trial court's decision in this matter in which that court also concluded that the State's efforts to control its own proprietary interests and declare illegal job targeting deductions were preempted. Unless the Court grants the petition, the reasoning of the lower court will certainly spread.[12]

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[11] *See* Northrup & White, *supra* note 4. (App. 66a).

[12] The comment about the seemingly perpetual confusion in the area of labor law preemption contained in an influential case book on labor law apparently still rings true today: "[n]o legal issue in the field of collective bargaining has been presented to the Supreme Court more frequently in the past thirty years than that of the preemption of state law, and perhaps no other legal issue has been left in quite as much confusion." Archibald Cox, et al., Cases and Material on Labor Law 895 (10th ed. 1986).

THE DECISION OF THE COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. Whether A State Court Can Declare Anti-Collusion Bidding Statutes And Bid Specifications In A Public Contract Preempted By The National Labor Relations Act Because Of A Job Targeting Program In A Union Contract?

1. Ohio's anti-collusion statute does not conflict with the NLRA and thus is not preempted under *Garmon*.

The state court's conclusion that the Ohio law and the Respondent School District's non-collusion affidavit are preempted by Section 7 of the NLRA conflicts with decisions of this Court. This case concerns a claim of a violation of a state bidding statute and a bid specification. Both prohibit collusion among the bidders to the public project in question. There is no Section 7 right for bidders to a public project to engage in collusion. If the bidders to a project seek to "cloak" themselves in Section 7 protection by the use of a collective bargaining agreement, this Court should not stand by and allow that procedure to stand. In this case, that is *exactly* what the state court of appeals allowed to happen.

Garmon itself recognizes that preemption under Section 7 of the NLRA is not absolute. First of all, a claim is not preempted under *Garmon* if the state law is merely a peripheral concern within the federal labor laws. *Garmon*, 359 U.S. at 243-44. The Court has explained that "due regard for the presuppositions of our embracing federal system . . . has required us not to find withdrawal from

the States of power to regulate where the activity regulated was a merely peripheral concern of the . . . Act." *Id.* at 243. In practice, this means at a minimum that State actions that do not affect the relationship between employees and their rights under Section 7 of the NLRA to engage in collective bargaining, to strike, to picket, or to join or not join a union are *not* preempted.

The Ohio statute and the Respondent School District's non-collusion affidavit do not in any way inhibit an employee's right to collectively bargain, to strike, picket, or join and not join a union. Succinctly, even with the prohibition against collusion, the employees are still free to bargain with employers, and to join or not join a union. After all, the prohibition against collusion concerns *communication among the contractors, not among employees or between employees and their employer.* Similarly, the impact of the prohibition against collusion in the bidding process *ends* when the contract is awarded—and ends before employees are even placed on the job. Finally, the prohibition against collusion in the bidding process applies to union and non-union contractors alike, therefore, it in no way is directed toward the individual bargaining relationship protected under Section 7. *See Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985) (statute not preempted where it required minimum health coverage for all union and non-union employees insured under a group health insurance policy); *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987) (statute not preempted that required employers to provide a one-time severance payment following a plant closing); *General Elec. Co. v. New York State Dep't of Labor,* 698 F. Supp. 1093 (S.D.N.Y. 1988), *vacated on other grounds,* 891 F.2d 25 (2d Cir. 1989), *cert. denied,* 496 U.S. 912 (1990) (state wage law that required

workers on public works projects to be paid no less than a prevailing wage was not preempted). In the end, and on many different grounds, the prohibition against collusion is not even peripherally concerned with the NLRB, consequently, the State's prohibition is not preempted. *Garmon*, 359 U.S. at 243.

The second exception under *Garmon* recognizes that there is some conduct by the parties that "touche[s] interests so deeply rooted in local feeling and responsibility that . . . [the Court] could not infer that Congress had deprived the States of the power to act." *Id.* at 244. This established exception applies here. First of all, collusion among contractors is not protected anywhere under Section 7 of the NLRA. In fact, nothing in federal labor law protects a contractor from State action where the contractor engages in collusive activity to receive a bid.

Additionally, the State certainly has an acute interest in protecting against collusion on the State's construction contracts. Recently, the Supreme Court of Ohio has explained that the purpose of the State's prohibition against collusion is to " 'save the public harmless' " from favoritism and fraud, and to ensure open and honest competition. *Cedar Bay Constr., Inc. v. City of Fremont*, 50 Ohio St. 3d 19, 21, 552 N.E.2d 202, 204 (1990) (quoting *Chillocothe Bd. of Educ. v. Sever-Williams Co.*, 22 Ohio St. 2d 107, 115, 258 N.E.2d 605, 610 (1970)). An additional local concern of Ohio's competitive bidding law is to prevent the public treasury from being plundered by rings and frauds. *State, ex rel. Baen v. Yeatman*, 22 Ohio St. 546, 1872 WL 40 (1872). Given the State's intense interest in eliminating collusion on its contracts, laws that provide for the exclusion of those contractors who violate this prohibition are not preempted. *See, e.g., Linn v. Plant Guard*

Workers, 383 U.S. 53 (1966) (malicious libel); *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (mass picketing and threats of violence).

Conversely, the State's prohibition is disinterested in interfering with any activity protected under Section 7 of the NLRA. As noted, *the prohibition against collusion concerns activity between contractors—not employees*—and concerns activity that precedes the commencement of work on a project. Therefore, there is no risk that the State will impede the exercise of rights protected under the NLRA through its prohibition. *Id. See also, Automobile Workers, supra,* (malicious interference with occupation by union's mass picketing and threats of violence).

The Court of Appeals of Ohio, Twelfth Appellate District, has rendered a decision that is directly at odds with this Court's holding that the State has a right to act in areas that are peripheral to Section 7 of the NLRA, and that are historically reserved to the States. Review by this Court of the lower court's decision is justified and essential.

2. The Ohio court decisions that have addressed the issue of preemption with respect to job targeting programs are in direct conflict with federal decisions addressing this same issue.

This Court in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), stated that preemption would *only* apply if the issue presented to the NLRB and the state controversy would be "identical." If the issue was not identical, the State *could* exercise jurisdiction. *Id.* at 510. Here, the controversy is not identical to an issue that could be brought before the NLRB as the issue here has *absolutely nothing* to do with the NLRA or the NLRB. This case centers around

an Ohio statute that prohibits collusion between contractors that are bidding on a State project. The statute at issue has *nothing* to do with employee-employer relations or collective bargaining. To even suggest that the NLRB has jurisdiction or even an interest in this issue is absurd. Yet, the Ohio courts that have addressed the issue have all misunderstood both the issue and the function, scope and jurisdiction of the NLRB and the NLRA.[13]

Authors Herbert R. Northrup and Augustus T. White in their law review article, *Subsidizing Contractors To Gain Employment: Construction Union "Job Targeting,"* 17 U. C. Berkeley J. of Employment & Labor Law (forthcoming January 1996) (App. 66a), directly addressed the flawed analysis of the Ohio decisions dealing with job targeting and *specifically cited* the lower court's flawed decision. In their analysis of these Ohio decisions the authors stated with respect to the issue of preemption:

> *In truth, it is not easy to see why preemption is even an issue in this litigation.* The state is not attempting to regulate dues check-off. It is not calling into question the underlying collective bargaining agreements. It is not adjudicating a dispute properly before the National Labor Relations Board or interfering in the zone left by Congress to the free play of economic forces. . . . There are

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[13] *Independent Elec. Contractors of Cincinnati v. County of Hamilton*, No. A-9209065 (Ohio C.P. Hamilton County Aug. 6, 1993) (App. 38a); *Independent Elec. Contractors of Cincinnati v. County of Hamilton*, 101 Ohio App.3d 580, 656 N.E.2d 18 (1st Dist. 1995); *J.A. Croson Co. v. Central Ohio JVSD*, No. 94CV-03-039 (Ohio C.P. Madison County June 8, 1994) (App. 10a); *J.A. Croson Co. v. Central Ohio JVSD*, No. CA94-07-026 (Ohio App. 12th Dist. May 30, 1995) (App. 1a); *J.A. Croson Co. v. J.A. Guy, Inc.*, No. 93-CI-000094 (Ohio C.P. Pickaway County Mar. 27, 1995) (App. 48a).

> many cogent arguments on both sides, but no real issue of federal labor policy.

Id. at 31-32 (App. 102a-03a) (emphasis added).

With respect to the issue of whether or not these state lawsuits are preempted under *Garmon*, the authors called these arguments a "red herring." *Id.* at 33. The authors stated:

> *Although federal preemption is ultimately a red herring,* the arguments should be visited briefly. *Garmon* preempts state regulation of activities which are arguably protected or prohibited by sections 7 and 8 of the NLRA. This type of preemption is designed to protect the jurisdiction of the NLRB. Although it is possible to argue that nearly anything involving a union is arguably protected by section 7 or arguably prohibited by section 8 of the NLRA, *it does not really seem that the state statutes in question have any connection with the core values of the NLRA. Much less would the state court actions under the state acts have any true significance for the jurisdiction of the Board.* At least since the *Sears* decision, *Garmon* is not applied mechanically or to matters of strong local interest, *and preemption depends on the similarity of the state law dispute to the hypothetical NLRB charge.*

Id. at 33-34 (App. 105a) (emphasis added).

Fortunately, the federal courts that have dealt with the issue of job targeting programs and the issue of preemption understood what the issue was and addressed it correctly. The federal courts have addressed the issue of preemption in the context of whether or not statutes that prohibit job targeting are preempted by the NLRA. Because job-targeting programs are being used by the unions to collude in violation of Ohio's law, the decisions of the federal courts that addressed whether or

not laws regulating job targeting programs were preempted by the NLRA may also be applied here to determine if a state law that prohibits collusion is preempted by the NLRA.

Federal appellate courts have held that job targeting deductions are illegal, *Building & Construction Trades Council v. Reich*, 40 F.3d 1275 (1994), *reh'g denied*, (Feb. 16, 1995), and another court specifically held that the case was not preempted by the NLRA. *International Bhd. of Elec. Workers, Local 357 v. Brock*, 68 F.3d 1194 (9th Cir. 1995). Additionally, two federal district courts have held that state laws regarding prevailing wage were not preempted, *Associated Builders and Contractors of Georgia, Inc. v. City of Atlanta*, No. 1:94-Cv-2012-ODE, 1995 WL 606778 (N.D.GA Aug. 5, 1995) (App. 55a); *General Elec. Co. v. New York State Dep't of Labor*, 698 F. Supp. 1093 (S.D.N.Y. 1988), *vacated on other grounds*, 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990).

Clearly, if federal appellate court cases that address job targeting have held them to be illegal, and in *Brock* not preempted, then logic dictates that bid rigging by collusion through job targeting programs also must fall outside of federal preemption. The simple fact is that States have the authority to prohibit collusion between contractors. The activity being prohibited by the State is not an issue that may be brought before the NLRB as it does not concern employee-employer relations. The State is not attempting to regulate or interfere with the rights, relationships, or any other matter that directly affects the employees or collective bargaining.

If the Respondents argue that the federal circuit court decisions all involved the Davis Bacon Act and are therefore, inappropriate, they are wrong. The federal cases

dealing with the issue of preemption have recognized that if an issue is preempted by the NLRB, the preemption would apply to *both* state and federal courts. In *Communications Workers v. Beck*, 487 U.S. 735 (1988), this Court said that *Garmon* preemption applied to federal courts as well as to state courts.[14] The Court stated:

> In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, (1959), we held that "when activity is arguably subject to § 7 or § 8 of the [NLRA], the States *as well as the federal courts* must defer to the exclusive competence of the [Board] if the danger of state interference with national policy is to be averted.

Id. at 742. (emphasis in original). Now, if this is true and if the decisions in the D.C. Circuit in *Reich*, and the Ninth Circuit in *Brock*, hold that job targeting deductions are illegal under the *federal* Davis Bacon Act, then *why* weren't these lawsuits preempted under *Garmon*? After all, both cases directly held that union deductions for job targeting that were labeled as union dues were illegal. Both cases are in direct conflict with the Ohio courts on this issue. The plain and simple answer is, of course, that they were not preempted in the first place and the court

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[14] The *only claim* preempted in *Beck* was where a *specific* allegation of a violation of the National Labor Relations Act was alleged. The other claims were allowed to *go forward* and the court ruled in the plaintiffs favor. The Court stated:

> We think it clear that the courts below *properly exercised jurisdiction over the latter two claims*, but that the National Labor Relations Board (NLRB or Board) had primary jurisdiction over Respondents' § 8(a)(3) claim.

Id. at 742 (emphasis added).

in *Brock* specifically held that the case was *not* pre-empted.[15]

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[15] In *Associated Builders and Contractors of Georgia, Inc. v. City of Atlanta*, No. 1:94-Cv-2012-ODE, 1995 WL 606778 (N.D.GA Aug. 5, 1995) (App. 55a), a case that involved a challenge to the prevailing wage law in Atlanta that had adopted by reference the federal Davis Bacon Act also found no preemption. Since the federal Davis Bacon Act was adopted by reference, it would have also included a prohibition on job targeting deductions. The Plaintiffs asserted that the Atlanta ordinance was *preempted* by the National Labor Relations Act. In denying this argument, the federal court found the City of Atlanta's arguments on this point to be "persuasive." The court stated:

> The City responds to Plaintiffs' argument by noting that the Machinists decision did not invalidate the power of States and localities to enact laws establishing minimum employment standards. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755 (1985); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 20-22. *The power of States and localities in this regard survives because "[m]inimum state labor standards affect union and nonunion employees equally,* and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." Metropolitan Life, 471 U.S. at 755. The City goes on to note that the Supreme Court has expressly recognized that the Davis-Bacon Act "on its face . . . is a minimum wage law designed for the benefit of construction workers." *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771 (1981). The City thus argues that a locality does not intrude into the preemptive zone that Congress implicitly established for "the free play of economic forces" *when the locality incorporates a federal minimum wage statute into a local ordinance.*
>
> Plaintiffs make *no credible response* to the City's Coutu-based argument. The court finds the argument persuasive, and therefore finds that Plaintiffs have *failed to prevail on the merits of their NLRA preemption claim.*

Id. at *3 (App. 61a-62a) (emphasis added).

The state statute in question is one that directly addresses the problem of collusion among contractors during the bidding process for public contracts. The statute applies to non-union as well as union contractors equally. Here, it just so happens that the collusive activity in question was channeled through the local union via its job targeting program. This is what creates the confusion in the state courts. The state courts cannot seem to grasp the concept that just because something involves a union contract it does not necessarily mean that collective-bargaining or employee-employer relations are at stake. In *Beckwith v. United States Parcel Service*, 889 F.2d 344 (1st Cir. 1989), the United States Court of Appeals for the First Circuit held that a deduction that was allowed to be made by the employer in a collective bargaining agreement was still illegal under state law and there was *no* preemption. Again, it was a recognition that a state has a right to set certain minimum labor standards and the deduction in question violated that state's minimum labor standard.

The union in the matter *sub judice* was not acting as a representative of the workers but rather as a conduit for the illegal transfer of information that was used to provide union contractors an unfair advantage over their non-union counterparts. *This has nothing to do with the collective bargaining process, employee-employer relations, the NLRA or the NLRB.* This is an issue that is clearly proper for state adjudication and is not preempted by the NLRA and thus is not subject to the jurisdiction of the NLRB.

In light of these federal decisions in addition to this Court's own holdings there can only be but one conclusion: the National Labor Relations Act does not preempt, and the NLRB has no jurisdiction over, state laws that prohibit job targeting or collusion among contractors via job targeting programs. Furthermore, these federal decisions also shed a contrasting light on the five Ohio decisions that attempted to address this same preemption issue.[16] The law as it stands today regarding the issue of preemption has a pronounced conflict between the Ohio courts and all federal courts. Simply put, the Ohio courts mandate that the issues of collusion and job targeting are preempted by the NLRA and the federal courts mandate the opposite. It is now up to this Court to set the record straight and to *prevent* any further confusion on the part of the state courts. This Court must make a ruling on this issue in order to stop the spread of this incorrect and ill founded state court precedent.

B. Whether The National Labor Relations Act Denies A State And Local School District The Right To Prohibit Collusion Among Any And All Bidders For A Contract For Which The State And School District Are Serving Their Own Proprietary Interests?

1. The Ohio decision is in direct conflict with the decisions of this Court and has stripped the State and School District of their authority to operate as market participants.

The decision of the Court of Appeals of Ohio, Twelfth Appellate District, further conflicts with decisions of this Court and other circuits. Contrary to the teaching of this

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[16] *See supra* note 13.

Court, the lower court has stripped the State of Ohio and local government of their authority to operate as market participants on their own construction contracts.

Indeed, the state court decision directly conflicts with the recent decision of this Court in *Building and Constr. Trades Council v. Associated Builders and Contractors, Inc.*, 113 S. Ct. 1190 (1993). In *Associated Builders*, the Court considered "whether a State may act without offending the preemption principles of the NLRA when it acts as a *proprietor* and its acts therefore are not 'tantamount to regulation,' or policy-making." 113 S. Ct. at 1197 (emphasis added). The Court concluded that a State could in fact conduct its own business and participate in the marketplace without offending activities protected under the NLRA. Specifically, the Court concluded:

> [w]hen a state owns and manages property, . . . it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state regulation.

Id. at 1196 (emphasis added). Consequently, when the State participates in the market on its own construction contracts, the State's control over the terms and conditions of its own contract does not equate to interference with activities protected under the NLRA, and therefore the State's actions are not preempted.

The State's authority to act as a market participant is particularly privileged where the State sets the conditions of the bidding process—just as the State acted on the Project let by the Respondent School District. The context within which *Associated Builders* arose is instructive in this regard. A federal district court had ordered the Massachusetts Water Resources Authority ("MWRA") to

clean up Boston Harbor within ten years, without allowance for delays caused by labor disputes. The MWRA owned the property to be cleaned up and had the authority to set all procedures for the project. Just like the School District in the present case, "the MWRA provide[d] the funds for construction, own[ed] the property to be built, established all bid conditions, decide[d] all contract awards, pa[id] contractors, and generally exercise[d] control and supervision over all aspects of this project." 935 F.2d at 347. In order to ensure that it could meet the ten year deadline, the MWRA permitted its project manager to enter into a "project labor agreement" that actually went to the heart of labor relations: among other things, the agreement provided for an exclusive bargaining agent for all craft employees, the use of specified methods of resolving labor disputes, a requirement that all contractors agree to be bound by the project labor agreement, and a ten-year no strike commitment. 935 F.2d at 347-48. The First Circuit Court of Appeals had ruled that the project labor agreement constituted a pervasive intrusion into the bargaining process. 113 S. Ct. at 1194. However, this Court corrected the error, explaining that the State was not regulating activity, but was permissibly acting as a market participant. 113 S. Ct. at 1198-99.

The State decision at issue here flatly conflicts with this Court's decision in *Associated Builders*. The Respondent School District was a market participant when it sought to define the terms by which it would interact with private participants on its own construction project. The School District owned and managed the property to be developed, and it had the authority to establish the bid conditions, award the contract, pay contractors, and generally control the Project. As a part of its overall control

of its own construction project, and in its role as a market participant, the School District also chose to prohibit collusion among bidders on its own contracts. This restriction was entirely consistent with the School District's role as the owner and operator of the property under construction. Pursuant to the allowance under *Associated Builders*, the Respondent School District, was permitted to prohibit collusion on its own contracts without regulating an area protected by Section 7 of the NLRA.

It is likely to be argued that the School District was not acting as a market participant but rather as a regulatory agent of the State charged with the responsibility of enforcing Ohio's anti-collusion statute. If this argument is made it would be in error. Assuming that the School District was acting as the regulatory agent of the State responsible for the enforcement of Ohio's anti-collusion statute, why would the School District implement its own, more *stringent* requirements for submitting bids if it were not acting on its own behalf as a *market participant*?

The School District required contractors that were placing bids for School District work to submit anti-collusion affidavits stating that they did not collude with anyone on any cost element in making their bids. (App. 36a). The requirements of the anti-collusion affidavit are *much more restrictive* than the state statute that prohibits collusion in submitting bids for state projects. Based on the fact that the School District's requirements are more stringent than those of the State's, there can be but one conclusion: the School District implemented stricter bidding standards because it was acting on its own behalf as a market participant.

Following the Court's decision in *Associated Builders*, at least one circuit court has properly concluded that when a State acts pursuant to its proprietary function as opposed to its regulatory function, the State is not subject to preemption under the NLRA. In *Babler Bros., Inc. v. Roberts*, 995 F.2d 911 (9th Cir. 1993), two non-union contractors challenged an Oregon statute that required contractors on State projects to pay a premium of time and a half for hours worked in excess of eight per day unless the workers were covered by a collective bargaining agreement. The Ninth Circuit reasoned that the statute was not preempted under the NLRA because "the state here has not endeavored to regulate the bargaining relationship of employers or employees." 995 F.2d at 916. Instead, the State was playing the role of a market participant and was "enforcing proscribed working conditions on public projects in which the state and local jurisdictions [had] a proprietary interest." *Id.*

Just like any other State, the State of Ohio, including the School District, is privileged to "manage its own property when it pursues its purely proprietary interests." 113 S. Ct. at 1198. The obstacle of prohibiting collusion at issue here certainly is not as great as the obstacle imposed by Massachusetts in *Associated Builders* where every contractor was required to sign a preordained collective bargaining agreement, and the employees were prohibited from striking for ten years. Just as the Court ruled that it will not interfere with such a restriction as imposed by Massachusetts, the same should hold true in Ohio. *Id.* Consequently, Petitioner urges the Court to grant the petition for writ of certiorari.

CONCLUSION

Job targeting programs exist throughout this Country involving hundreds of millions of dollars of wages that are being diverted to the pockets of union contractors in *illegal kick-backs*. In this case, it is not the deduction that has been challenged. Rather, it is the manner in which this program has operated that has allowed union contractors, using the union as a conduit, to pass information to each other in order to obtain bids on public projects. To prohibit the States from banning the use of these programs as a means to engage in collusion and bid rigging under the guise of labor law preemption is plain error and must be reversed.

Ohio's anti-collusion statute is simply not preempted by the NLRA because the statute does not encroach upon the domain of the NLRA or the jurisdiction of the NLRB. The state courts have either failed to understand or have simply ignored this Court's stated exceptions to *Garmon* preemption. That is, a claim will not be preempted under *Garmon* if the state law is merely a peripheral concern within the federal labor laws or if the conduct touches interests so deeply rooted in local feeling and responsibility that the Court could not infer that Congress had deprived the States of the power to act. 359 U.S. at 243-44. Both exceptions apply here.

Moreover, the state courts have also ignored this Court's ruling in *Belknap Inc. v. Hale*, 463 U.S. 491 at 510, wherein this Court stated that preemption would only apply if the issue presented to the NLRB and the state controversy would be identical. Here, the issues are not even related let alone identical. Yet, the state courts still

find preemption in light of the facts that the State prohibitions do not affect employer-employee relations, collective bargaining, or any other issue that falls within the protection of the NLRA. In short, the state courts have not grasped the concept that just because an issue involves a union contract it does not necessarily mean that collective bargaining or employer-employee relations are at stake.

Finally, this Court in *Communications Workers v. Beck*, 487 U.S. at 742, held that preemption applies to both state and federal courts. Yet, federal courts, unlike the Ohio courts, have ruled on these same job targeting issues without finding the issues to be preempted by the NLRA. Now, as a result of the Ohio courts persistence in finding these issues to be preempted by the NLRA, a blatant conflict now exists between state court precedent and federal precedent concerning whether or not state prohibitions regarding collusion through job targeting programs are preempted by the NLRA. This Court must now address this issue before the confusion and conflict spreads any further.

Moreover, every State in the Union has established procedures and prohibitions controlling its own contracts. At least twenty-one States in addition to Ohio have statutes that specifically prohibit collusion on bidding for State contracts.[17] The issue of whether a State can control activity on its own contracts when the State is acting as a market participant is of vital interest not only to Ohio, but to every state.

In this case, the state appellate court below effectively repealed a legitimate state action that in no way

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[17] *See supra* note 2.

interferes with or is contrary to the NLRA. Every year, the fifty states, cities and local governments let millions of public contracts to various private companies. One of the major protections against fraud in this process is the elementary and commonplace requirement that the competing bidders not share information or fix their prices on their bids. Although the States enforce their prohibitions against collusion on a daily basis, no court has ever determined that a State's effort to monitor and control the fairness and honesty of the bidding process on its own contracts is not a legitimate state action. The decision below threatens the strong, sensible, and legitimate interests the States have established on letting contracts when they act as a market participant.

For the foregoing reasons, this Court should grant Croson's petition for a writ of certiorari.

Respectfully submitted,

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January 16, 1996

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APPENDIX A

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

J.A. CROSON COMPANY, Plaintiff-Appellant, -vs- CENTRAL OHIO JOINT VOCATIONAL SCHOOL DISTRICT, et al., Defendants-Appellees.	:	CASE NO. CA94-07-026 OPINION 5/30/95

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Schottenstein, Zox & Dunn, Felix C. Wade and Edwin L. Skeens, 41 South High Street, Columbus, Ohio 43215, for defendant-appellee, Fox Mechanical Company

KOEHLER, J. Plaintiff-appellant, J. A. Croson Company ("Croson"), appeals a decision of the Madison County Court of Common Pleas denying its motion for a temporary restraining order, denying its motion for leave

to amend its complaint, and granting judgment on the pleadings. We affirm.

Croson, a non-union contractor, was one of six contractors who submitted bids on a plumbing contract solicited by defendant-appellee, Central Ohio Joint Vocational School District ("school district"), on a Tolles Technical Center expansion project ("project"). The bid results released by the school district on March 17, 1994 revealed that defendant-appellee, Fox Mechanical Company ("Fox"), a union contractor, was the lowest bidder and Croson was the second lowest bidder. Croson filed a motion for a temporary restraining order to enjoin the school district from executing a contract with Fox. Croson also filed a protest with the school district. After a hearing, the school district awarded the contract to Fox.

At a hearing on the motion for temporary restraining order held on April 5, 1994, Croson argued that Fox's participation in a union "job targeting" program violated Ohio's competitive bidding statute, R.C. 3313.46, and the terms of the non-collusion affidavit which all bidders on the project were required to submit. Under a job targeting program, a portion of the union dues collected from the membership are allocated to a union fund which is used to subsidize the hourly labor rate paid by a union contractor on targeted projects in order to make the labor portion of the union contractor's bid competitive with that of non-union bidders. Prior to bidding on a project, a union contractor submits a "request for target" to the union, identifying the project and estimating the necessary man-hours. The union decides whether to make the project a targeted job and, if so, sets the amount of the per-hour subsidy and a cap on the total amount available.

If the job is targeted, the information is given to all union contractors bidding on the job. Those who subsequently submit a bid give the union a sealed envelope containing that contractor's actual man-hours included in the bid. The envelopes remain sealed until the bids are opened.

The trial court found in its April 11, 1994 decision and entry that it was probable that federal labor law preempted Croson's state law cause of action, that there was nothing to suggest collusion among bidders and that, given the existing precedent on job targeting and preemption, there was no basis to find that job targeting constitutes collusion. In denying Croson's motion for a temporary restraining order, the court further found that there could be an adequate remedy at law. Croson subsequently sought to amend its complaint to include a claim for damages, but the court denied the motion, stating that Croson failed to state a claim upon which relief could be granted. The court then granted judgment on the pleadings. Croson raises six assignments of error on appeal:

Assignment of Error No. 1:

The Trial Court Erred By Using The Wrong Standard In Granting The School District's Motion For Judgment On The Pleadings[.]

Assignment of Error No. 2:

The Trial Court Erred In Finding That Plaintiff Did Not Assert A Claim That Job Targeting Violates Ohio's Competitive Bidding Statutes[.]

Assignment of Error No. 3:

The Trial Court Erred in Finding That Croson Had An Adequate Remedy At Law[.]

Assignment of Error No. 4:

The Trial Court Erred By Finding That Job Targeting Does Not Constitute Collusion[.]

Assignment of Error No. 5:

The Trial Court Erred In Denying Croson's Motion For Leave To Amend Its Complaint[.]

Assignment of Error No. 6:

The Trial Court Erred In Finding That Croson's Claims Were Preempted By Federal Labor Law[.]

In Croson's sixth assignment of error, it argues that the trial court erred in finding that Croson's claims were preempted by federal labor law. The trial court relied upon *Independent Electrical Contractors of Greater Cincinnati, Inc. v. County of Hamilton, Division of Public Works* (Aug. 6, 1993), Hamilton C.P. No. A-9209065, unreported. The issue in *Independent Electrical Contractors* was whether or not union allocation of a percentage of its general membership dues, collected by employers, to a job targeting fund violated Ohio's prevailing wage statute. The Hamilton County Common Pleas Court found that the plaintiff's state law claim was preempted by federal labor law.

In the instant case, Judge Robert Nichols found that nothing in counsel's presentations suggested that the competitive bidders engaged in collusion under the plain language of R.C. 3313.46 (A)(10). Judge Nichols relied upon *Independent Electrical Contractors* to conclude that Croson's state law claims grounded in the prevailing

wage statute, the non-collusion affidavit, and the competitive bidding statute were preempted by the National Labor Relations Act, Section 151 *et seq.*, Title 29, U.S. Code ("NLRA"). The *Independent Electrical Contractors* decision was recently affirmed by the First District Court of Appeals, which noted that "a challenge to the use of union dues for purposes other than collective bargaining is subject to section 8 [of the NLRA] and therefore preempted[.]" *Independent Electrical Contractors of Greater Cincinnati, Inc., v. County of Hamilton, Division of Public Works* (Mar. 8, 1995), Hamilton App. No. C-930640, unreported.

Croson raised the prevailing wage issue as well as the collusion issue during oral argument at the temporary restraining order hearing. Croson argues on appeal, however, that is [sic] complaint does not raise a prevailing wage claim, but rather alleges "collusion in the bidding process through participation in a job targeting program." What is at issue in this case, then, is whether federal labor law preempts a state law cause of action alleging that a bidder's participation in a union job targeting program constitutes collusive activity in violation of Ohio's competitive bidding statute (R.C. 3313.46) and the school district's non-collusion affidavit.

The United States Supreme Court addressed NLRA preemption of state law in *San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236, 79 S.Ct. 773. The Court said,

> [w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor

> Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield.

Id. at 244, 779. The school district urges this court to determine that there was no collusion as a matter of law, and that if we so determine then preemption is not an issue. The United States Supreme Court has indicated, however, that "[i]f there is preemption under *Garmon*, then state jurisdiction is extinguished." *Longshoreman v. Davis* (1986), 476 U.S. 380, 391, 106 S.Ct. 1904, 1912. Preemption is a threshold inquiry; if Croson's state law cause of action is preempted by federal labor law, a state court must decline jurisdiction in deference to the National Labor Relations Board ("NLRB"). *Id.*

Our inquiry therefore begins by asking whether union job targeting activity is arguably protected under Section 7 of the NLRA. Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition or [sic] employment as authorized in section 8(a)(3).

NLRA, Section 157, Title 29, U.S. Code. Section 8 makes it an unfair labor practice for employers or their agents to

"interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7." NLRA, Section 158(a)(1), Title 29, U.S. Code.

Central Ohio Joint Vocational School District Board of Education cites *Manno Electric, Inc.*, N.L.R.B. Case No. 15-CA-11891 (July 20, 1994) (1994 NLRB LEXIS 542), where Manno, a non-union contractor, alleged that a competing union participated in a job targeting program with the intent of injuring and restraining Manno's trade. Manno's cause of action was grounded in libel, harassment, and intentional infliction of emotional distress. The Administrative Law Judge ("ALJ") said in the opinion:

> Whether the Plaintiff may pursue a state lawsuit based on such a claim depends on whether the "job targeting program" is protected by the Act. * * * Section 7 provides that employees shall have the right "to engage in other concerted activities for the purpose of * * * other mutual aid or protection." The objectives of the "job targeting program" are to protect employees' jobs and wage scales. These objectives are protected by Section 7. Thus, the plaintiff's suit, which interferes with, restrains, and coerces employees in their Section 7 rights, offends Section 8(a) (1) of the Act. The claims which the Plaintiff sought to press were preempted.

Manno, 1994 NLRB LEXIS at *68.[1]

Croson argues that its state claim should not be preempted by the NLRA because it is not challenging the

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[1] Exceptions were filed to the Administrative Law Judge's decision on September 19, 1994, and the case is currently pending before the NLRB.

legality of job targeting *per se*. Rather, Croson alleges that the way job targeting is implemented violates the non-collusion affidavit and Ohio's competitive bidding statute. We find that distinction to be illusory. In *Manno, supra*, the plaintiff did not challenge job targeting directly, but alleged that the union and its members engaged in job targeting with the intent of harassing the plaintiff and injurying his business. The ALJ determined that such a challenge interfered with and restrained the union in their Section 7 rights and was preempted.

Garmon, supra, emphasizes that the unifying thread in the Supreme Court's labor law preemption decisions is that fact that Congress created a specialized, centralized agency to administer labor policy nationally, to "avoid-* * * diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies." *Garmon*, 359 U.S. at 242-243, 79 S.Ct. at 778. The Supreme Court has set out a narrow exception to the *Garmon* rule for conduct of peripheral concern to the NLRB or deeply rooted in local feeling and responsibility, which requires a balancing of the state's interest in controlling the conduct against the risk that the state will sanction conduct which the NLRA protects. See *Bellnap, Inc. v. Hale* (1983), 463 U.S. 491, 498-499, 103 S.Ct. 3172, 3177. The conduct involved in this case, however, does not implicate a state interest of greater weight than the federal interest in the uniformity of its labor policy. Application of R.C. 3313.46 in this case would allow a state court to regulate the procedure by which a union administers job targeting. In denying Croson's motion for a temporary restraining order, the trial court did not err in finding that Croson's state law cause of action would

be preempted because it involves activity arguably protected under Section 7 of the NLRA. Croson's sixth assignment of error is not well-taken and is overruled.

Croson's first through fifth assignments of error are rendered moot by our decision in this case and will not be discussed.

Judgment affirmed.

JONES, P.J., and YOUNG, J., concur.

Jones, P.J., retired of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6(C), Article IV, of the Ohio Constitution.

APPENDIX B

COURT OF COMMON PLEAS,
MADISON COUNTY, OHIO

J.A. CROSNON COMPANY,	:	Case No. 94CV-03-039
	:	DECISION AND ENTRY
PLAINTIFF,	:	
VS	:	
CENTRAL OHIO JOINT VOCATIONAL SCHOOL DISTRICT,	:	
DEFENDANT.	:	

Plaintiff commenced the within action on March 25, 1994, in which it seeks injunctive relief, a writ of mandamus and declaratory judgment arising out of competitive bids for a plumbing contract solicited by Defendant Central Ohio Joint Vocational School District. The matter is before the Court on Plaintiff's motion for a temporary restraining order to enjoin Defendant's superintendent from executing a plumbing contract with intervening Defendant Fox Mechanical Co. Apparently in conformity with R.C. 3313.46(3), Defendant received bids for the plumbing contract on March 17, 1994. On March 31, 1994, Defendant voted to award the contract to Fox.

Efforts to coordinate an informal hearing regarding Plaintiff's motion for a temporary restraining order failed. However, Defendant cooperated by not executing the subject contract before hearing on April 5, 1994. Execution of the contract is scheduled for April 12th, and

Defendant intends to proceed that date with execution absent an order from this Court to the contrary.

A hearing was conducted by oral argument. No evidence was adduced. In essence, the parties asked the Court to give an advisory opinion on the ultimate issues when deciding whether a temporary restraining order (TRO) should issue.

A TRO may only issue upon a pretrial finding that in its absence the applicant will suffer " * * * immediate and irreparable injury, loss or damage * * * " before the other party can be heard. Because all parties in interest appeared for or in opposition to the issuance of a TRO, the proceedings approximated a hearing for a preliminary injunction.

Under our hybridized proceedings, *Diamond Co. v. Gentry Acquisition Corp.* (1988), 48 Ohio Misc. 2d 1, is instructive. In considering an application for a preliminary injunction, the following factors should be considered: 1) Plaintiff's likelihood of success on the merits, 2) whether Plaintiff has an adequate remedy at law, 3) whether an injunction will prevent claimed irreparable harm, 4) damages, if any, to other parties, 5) impact on public interest in issuing an injunction and 6) whether *status quo* will be maintained.

The undisputed facts appear from arguments to be that in February, 1994, Defendant advertised for bids from contractors for the construction of an addition to Tolles Technical School operated by Defendant's board. Bids were received on March 17, 1994, and Defendant Fox Mechanical Co. submitted the lowest bid, to-wit:

$277,900.00. Fox's bid was $15,549.00 less than Plaintiff's bid.

When Fox submitted its bid to Defendant, it included an affidavit which stated

> * * * that such bid is genuine and not collusive or sham; that such bidder has not directly or indirectly induced or solicited any other bidder to put in a false or sham bid, and has not directly or indirectly colluded, conspired, connived, or agreed with any bidder or anyone else to put in a sham bid, or that any one shall refrain from bidding; that said bidder has not in any manner, directly or indirectly, sought by agreement, communication or conference with any one to fix the bid (price) of said bidder or of any other bidder, or to fix any overhead, profit, or cost element of such bid price, or of that of any other bidder, or to secure any advantage against the owner awarding the contract or anyone interested in the proposed contract; that all statements contained in such bid are true; and, further, that said bidder has not, directly or indirectly, submitted his bid price or any breakdown thereof, or the contents thereof, or divulged information or data relative thereto, or paid and will not pay any fee in connection therewith, to any corporation, partnership, company, association, organization, bid depository, or to any member or agent thereof, or to any other individual except to such person or persons as have a partnership or financial interest with said bidder in his general business.
>
> * * *

According to Fox, which is a Union contractor, Plumbers Local 189 has a collective bargaining agreement by

which it may target particular jobs. The precise method by which targeting is utilized is not completely clear, but for purposes of this motion it is sufficient to say that in a targeted job, the contractor estimates the probable man-hours required to complete the contract. Union members consent through their collective bargaining agreement that a 2% assessment be deducted from their wages and be placed in a targeting account. If the Union agrees to target a particular job, Union contractors submit their sealed hour estimates to the Union. The Union agrees to pay the contractor a set amount of money per man-hour up to a maximum amount. Under the scheme, the successful union contractor has a reduced net hourly rate that he must pay to union laborers.

Ohio has adopted statutes on "Wages and Hours on Public Works," R.C. 4115.02 et seq. A prevailing wage is established by R.C. 4115.04. In *State, ex rel. Evans v. Moore* (1982), 69 Ohio St. 2d 88, the Ohio Supreme Court stated:

> * * * The prevailing wage law evidenced a legislative intent to provide a comprehensive, uniform framework for, *inter alia*, worker rights and remedies vis'-a-vis' private contractors, subcontractors and material men engaged in the construction of public improvements in this state. The prevailing wage law delineates civil and criminal sanctions for its violation. Above all else, the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector.
>
> * * *
>
> (Id., 91)

This purpose is achieved through comprehensive statutory scheme which includes administrative, civil and criminal proceedings. *State v. Buckeye Electric Co.* (1984), 12 Ohio St. 3d 252. For instance, R.C. 4115.04 provides in part "Every public authority authorized to contract for or construct with its own forces a public improvement, before advertising for bids or undertaking such construction with its own forces, shall have the department of industrial relations determine the prevailing rates of wage of mechanics and laborers in accordance with section 4115.05 of the Revised Code for the class of work called for by the public improvement, in the locality where the work is to be performed. . . . "

R.C. 4115.05 provides that the prevailing rate of wage upon public works shall not be less than the prevailing rate of wage for the same trade or occupation in the locality where the work is to be performed during the life of the contract. Thus, every contract shall contain a provision that laborers shall be paid the prevailing rate of wage.

Basically, the Prevailing Wage Law imposes upon public authorities, contractors and subcontractors a duty to ensure that all public improvements are constructed by employees who are paid the prevailing wage rate for the locality in which the public improvement is situated.

To further the apparent statutory purposes of the Prevailing Wage Law, the Department of Industrial Relations promulgated O.A.C. 4101:0-4-07 which establishes permissible payroll deductions:

* * *

(B) The following deductions from wages may be made only if, prior to commencement of work by the employee on any project, employers procure and maintain, in writing, proof of voluntary deductions signed by the employee:

* * *

(6) Any deductions to pay regular union initiation fees and membership dues, not including fines and special assessments, provided that a collective bargaining agreement between the employer and representatives of its employees permits such deductions and such deductions are not otherwise prohibited by law.

* * *

The clear purpose of the statutory and regulatory scheme is to create a fixed and unmodifiable labor pay rate for public improvement. O.A.C. 4101:9-4-07 assures that the contractor or subcontractor can not [sic] reduce the labor cost component of its bid. In other words, the one fixed cost of all bids for public improvements is labor subject to the actual number of hours required to perform the work required.

In reality, absent a required prevailing wage rate, non-union contractors would be at a competitive advantage in securing contracts because their cost of labor would be substantially less than that of union contractors. Plaintiff complains and the arguments herein support that job targeting now gives the union contractor a

competitive advantage because the union provides a kick-back from wages to reduce the hourly rate actually paid to laborers.

The Court has thoroughly reviewed *Independent Electrical Contractors of Greater Cincinnati, Inc. v. Community of Hamilton Division of Public Works* (August 6, 1993), Hamilton C.P. Case No. A-9209065, unreported, and Plaintiff's AMICUS BRIEF filed in the appeal of that decision. Plaintiff has established compelling legal reasons why federal preemption should not impair the statutory and regulatory scheme of Ohio's Prevailing Wage Law by a dues check off arrangement between union contractors and union members. However, for purposes of determining whether a TRO should issue, one significant fact is the likelihood of success Plaintiff will have at trial. Given the finding in the *I.E.C.* that ". . . to the extent that LMRA Section 302(C)(4) permits employees to deduct special assessments from the wages of their employees and remit them to the employee' [sic] exclusive bargaining representative, here *I.B.E.W.*, Local 212, the State's regulations is pre-empted by federal law . . . ", it is probable that O.A.C. 4101:9-4-07 has been pre-empted by LMRA Section 302(C)(4). Within the limited scope of review from the Court, a further immediate review and analysis of the *I.E.C.* is impractical if not impossible.

However, although Plaintiff believes that *I.E.C.* is wrongly decided, the gravamen of Plaintiff's complaint is that Fox's affidavit of non-collusion has been violated by the job targeting scheme that it participates in with its union laborers.

Pertinent to the Court's decision are two provisions contained in R.C. 3313.46 which establish bidding procedures for construction or improvement of school buildings:

* * *

> (A)(7) None but the lowest responsible bid shall be accepted. The board shall reject all the bids, or accept any bid for both labor and material for such improvement or repair, which is lowest in the aggregate. . . .
>
> * * *
>
> (10) When there is reason to believe there is collusion or combination among the bidders, or any number of them, the bids of those concerned therein shall be rejected.

* * *

The plain language of R.C. 3313.46(A)(10) prohibits collusion or combination among bidders. There is nothing from the presentations of counsel that suggest that competitive bidders (and specifically FOX) have engaged in collusion or combination with each other in an attempt to offer the lowest responsible bid.

The affidavit submitted by Fox has been previously set forth. Plaintiff argues that job targeting fixes an overhead, project or cost element of the bid in violation of the affidavit. Since Plaintiff can not [sic] reduce its obligation to pay laborers the prevailing wage, job targeting creates a vehicle by which Fox can submit a lower bid based on labor costs below the prevailing wage. Plaintiff denominates this process as collusion. To the extent that *Independent Electrical Contractors of Greater Cincinnati, Inc. v.*

Community of Hamilton, Division of Public Works, supra, remains the law, there is no basis to find that job targeting constitutes collusion within the affidavit factually or as a matter of law.

By operation of R.C. 3313.46(A)(7), Defendant was required to accept the lowest responsive bid. Acceptance is circumscribed by discretion. "The rule is generally accepted that, in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner. All legal intendments are in favor of administrative action." *State, ex rel. Shafer v. Ohio Turnpike Comm.* (1953), 159 Ohio St. 581, 590. Thus, absent an abuse of discretion, courts defer to administrative decisions. *Id.; Dayton, ex rel. Scandriek v. McGee* (1981) 67 Ohio St. 2d 356. "The meaning of the term 'Abuse of discretion' . . . connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude . . . 'Arbitrary' means 'without adequate determining principle . . . not governed by any fixed rules or standards . . . 'Unreasonable' means 'irrational.' " *Id.*, 359.

To be entitled to injunctive relief, Plaintiff bears the burden of ultimately establishing by clear and convincing evidence that Defendant abused its discretion in accepting Fox's bid. *Wilson Bennett, Inc. v. Greater Cleveland Regional Transit Authority* (1990), 67 Ohio App. 3d 812.

"The best bid is to be determined from all the surrounding circumstances * * * " *Cletus Bowling and Gaston Bowling dba Bowling Construction v. Eaton* (Dec. 30, 1985), Preble App. CA 85-04-010, unreported.

Again, relying on the *E.I.C.* case. [sic] the Court finds that defendant probably did not abuse its discretion in accepting Fox's bid.

Finally, as a general principle, an injunction will not lie where there is an adequate remedy at law for an aggrieved plaintiff to pursue. Moreover, particular caution should be exercised in granting injunctions where public interests may be adversely impacted. This is especially true where a plaintiff requests the Court to interfere with or suspend the operation of important works or to control the actions of another branch of government. *White v. Long* (1967), 12 Ohio App. 2d 136.

In *Leaseway Distribution Centers, Inc. v. Ohio Dept. of Adm. Serv.* (1988), 49 Ohio App. 3d 99, the Franklin County Court of Appeals stated at page 106

* * *

> Neither an injunction nor a writ of mandamus can be issued when there is an adequate remedy at law.
>
> 'For a remedy at law to be adequate, the remedy should be complete in its nature, beneficial and speedy. . . . The question is whether the remedy is adequate under the circumstances.'

* * *

Because profit projections were subject to many variables which could not be accurately qualified, it would be

both speculative and difficult to calculate lost profits with reasonable certainty. Thus, the *Leaseway* Court found that injunctive relief was appropriate. However, the court recognized that when an unsuccessful bidder has sustained *measurable damages* based on a fixed contract from which profits could accurately be determined, then an action for damages could be pursued in favor of injunctive relief.

Plaintiff cited *Owen of Georgia, Inc. v. Shelby County* (1981), 648 F.2d 1084, for the proposition that damages may not be awarded against a governmental agency for violation of a bid required on a public contract. There, the county rejected the lowest responsible bid because the contractor did not satisfy a quantitative affirmative action goal nor a preference for local contractors. The court concluded that because the law provided that all bids may be rejected for good cause, the contractor had no vested or contractual right to an award of a public contract thereby vitiating a claim for lost profits as damages.

The court noted, however, that the county "* * * clearly promised to award the contract to the lowest financially responsible bidder if it awarded the contract at all. Each prospective bidder could justifiably expect that his proposal would receive fair consideration consistent with this promise. We believe that the Tennessee courts would find that Owen's reasonable and detrimental reliance upon this promise entitles it to damages under the theory of promissory estoppel." *Id.*, 1095.

Plaintiff argues that, as a matter of law, it is not entitled to pursue defendant for damages. Without deciding whether the school district is the party against whom

damages may be sought, it is apparent under the rationale of *Owen* that a cause of action might be couched in promissory estoppel. Certainly damages in the case *sub judice* could be established with reasonable certainty as explained in *Leaseway*. For purposes of the within motion, the Court finds that plaintiff has neither established nor argued any facts which suggest that damages for lost profits could not be established with reasonable certainty. It appears that plaintiff has an adequate remedy at law.

For all the reasons stated herein, the Court finds: 1) defendant will probably win on the merits, 2) plaintiff probably has an adequate remedy at law if liability is established, 3) plaintiff is probably not exposed to irreparable injury, 4) the issuance of a TRO will probably result in substantial harm to defendant to the detriment of the public interest in timely construction of the subject building. The issuance of a TRO would inappropriately maintain the *status quo*.

Therefore, It Is Ordered that plaintiff's motion for a TRO is Overruled in whole and each particular.

Judgment is entered accordingly.

Enter: April 11, 1994

/s/ Robert D. Nichols
JUDGE

cc: Roger [sic] Mason
Steven Tigges
Edwin Skeens

APPENDIX C

IN THE COURT OF COMMON PLEAS,
MADISON COUNTY, OHIO

J.A. Croson Company, Plaintiff,	:	Case No. 94CV-03-039
-vs-	:	DECISION AND ENTRY
Central Ohio Joint Vocational School District, Defendant.	:	

On April 18, 1994, defendant Central Ohio Joint Vocational School District moved for judgment on the pleadings. In response, plaintiff moved to amend its complaint to allege damages in lieu of injunctive relief. Further, it filed a memorandum in opposition to defendant's motion for judgment on the pleadings.

This Court previously found that job targeting is not collusive as a matter of law. Therefore, plaintiff's proposed amendment would not create a monetary claim predicated on such allegations. The amendment sought would not state a claim for which relief can be granted.

Defendant's motion for judgment on the pleadings is Sustained in whole and each particular. Plaintiff's motion to amend is Overruled.

The decision of April 11, 1994, is incorporated herein by reference.

The within cause is dismissed at plaintiff's costs.

Judgment is entered accordingly.

Enter: June 8, 1994

/s/ Robert D. Nichols
JUDGE

Entry cc:

Ronald L. Mason

Edward [sic] L. Skeens

Steven W. Tigges

Robert P. Stapleton

APPENDIX D

THE SUPREME COURT OF OHIO

J.A. Croson Company,	:	1995 TERM
Appellant,	:	To wit: October 18, 1995
v.	:	Case No. 95-1422
Central Ohio Joint Vocational School District et al.,	:	ENTRY
Appellees.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Kasey Davis.

(Madison County Court of Appeals; No. CA9407026)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX E

IN THE COURT OF COMMON PLEAS MADISON COUNTY, OHIO

J.A. CROSON COMPANY, Plaintiff,	:	
v.	:	Case No.
CENTRAL OHIO JOINT VOCATIONAL SCHOOL DISTRICT, Defendant,	:	Judge Robert D. Nichols
AND	:	
FOX MECHANICAL CO., Defendant.	:	

AMENDED VERIFIED COMPLAINT

FIRST CAUSE OF ACTION

1. Plaintiff J.A. Croson Company ("Croson") is a qualified, competent and experienced contractor.

2. Defendant Central Ohio Joint Vocational School District ("Central Ohio") solicited requests for proposals for labor and/or materials described in a document prepared by Central Ohio (hereinafter referred to as "RFP").

3. The RFP involved a project commonly referred to by Central Ohio as the Tolles Technical Center Expansion (hereinafter referred to as the "Project").

4. Croson submitted a proposal for the Project.

5. Upon information and belief, Croson asserts that it submitted a proposal which was the lowest, most

responsive and cost effective proposal received by Central Ohio, and Croson was the most responsible company that submitted a bid.

6. Defendant Central Ohio was legally obligated to award the contract to Croson because it was the lowest, most responsive and responsible company submitting a proposal, and its proposal was the most cost effective proposal.

7. Defendant Central Ohio has rejected Croson's proposal.

8. Defendant Central Ohio has awarded the contract in dispute to Fox Mechanical Co., another bidder for the Project.

9. Fox Mechanical Co.'s base bid was $277,900.00 and J.A. Croson's base bid was $293,449.00. See Exhibit "A" attached hereto.

10. The proposal submitted by Fox Mechanical Co. does not reflect Fox Mechanical Co.'s actual costs for this job.

11. Fox Mechanical Co. has materially violated the non-collusion affidavit that was required to be submitted with the bid and the Ohio statute prohibiting collusion among the bidders on construction of a schoolhouse.

12. The non-collusion affidavit states in relevant part as follows:

> [T]hat said bidder has not in *any manner, directly or indirectly, sought by agreement, communication or conference with any one* to fix the bid rice (sic) of said bidder or of any other Bidder, *or to fix any overhead, profit, cost element of such Bid price,* or of that of any other Bidder, *or to secure any*

> *advantage against* the Owner awarding the contract or *anyone interested in the proposed contract* . . .

Non-Collusion Affidavit (emphasis added). See Exhibit "B" attached hereto.

13. The Ohio statute prohibiting collusion among the bidders, R.C. § 3313.46(A)(10), states as follows:

> When there is reason to believe there is collusion or combination among the bidders, or any number of them, the bids of those concerned therein shall be rejected.

14. Plumbers and Pipefitters Local Union 189 and the union contractors who are signatory to their collective bargaining agreement have set up a job targeting program.

15. The job targeting program is funded by a 2% assessment against the wages of all union members made by employers who are signatory to the collective bargaining agreement with Local 189, and those employers remit these funds to Local 189.

16. The job targeting program operates by having any union contractor request that a specific job be "targeted".

17. If Local 189 agrees to target a job, then it advises all union contractors that the job has been "targeted" and the amount of money to be kicked back to union employers in the form of a per hour wage subsidy.

18. When Local 189 agrees to target a job, it agrees to pay a kickback in the form of a per hour wage subsidy to any union contractor who is awarded the job, with the source of such funds being the union's job targeting fund.

19. If Local 189 agrees to a $8.00 per hour kickback, the union contractor who is awarded the contract gets a monthly check from the union at a rate of $8.00 per hour for every hour a union member works on the job.

20. Fox Mechanical Co. is required by the bid documents to pay a prevailing wage rate of $21.09 per hour, but through its receipt of the per hour wage subsidy through the job targeting program, realizes an actual labor cost substantially lower than that amount.

21. The lower labor cost realized by Fox Mechanical Co. through its receipt of targeted funds results from the fixing of an overhead cost, which creates for Fox Mechanical Co. and all union contractors who bid on this job an unfair competitive advantage.

22. The unfair competitive advantage enjoyed by Fox Mechanical Co. is obtained through collusion among those bidders who are union contractors who have avoided disclosing the names of each person having an interest in the bid proposal at issue, avoiding compliance with the applicable Non-Collusion Affidavit requirements, and avoiding compliance with R.C. § 3313.46(A)(10).

23. The rejection of Croson's proposal was based on incomplete, inaccurate, and otherwise misleading facts.

24. The procedure used by Defendant Central Ohio to reject Croson's proposal was arbitrary and inconsistent with applicable law.

25. Croson has requested that Defendant Central Ohio not award a contract to another company for the Project.

26. Defendant Central Ohio has awarded the contract to a less qualified company for the Project, Fox

Mechanical Co. Central Ohio has illegally awarded the contract when there was a material deviation from the RFP.

27. Croson and the taxpayers of Ohio will be irreparably harmed because Defendant Central Ohio refuses to award the contract to Croson, and Defendant Central Ohio may have already entered into an illegal contract with another company for the Project.

28. Croson has no adequate remedy at law because of the inability of Croson to recover its lost profits from either Defendant Central Ohio or Defendant Fox Mechanical Co., and that Croson has suffered damage to its reputation, its profits, and its employee morale caused by the actions and threatened actions of Defendant Central Ohio and Fox Mechanical Co.

SECOND CAUSE OF ACTION

29. Croson repeats and incorporates the allegations contained in the above paragraphs to the same extent as if fully rewritten herein.

30. Defendant Central Ohio has a mandatory legal duty to award the contract to Croson, the most responsive and responsible company submitting the lowest price proposal which complies with the applicable plans and specifications for the Project.

31. Defendant Central Ohio has failed and refused to honor this legal obligation, despite repeated demands by Croson for Defendant Central Ohio to do so.

32. Croson believes that it has no plain and adequate remedy in the ordinary course of the law and that a writ of mandamus is appropriate.

THIRD CAUSE OF ACTION

33. Croson repeats and incorporates the allegations contained in the above paragraphs to the same extent as fully rewritten herein.

34. Croson, on behalf of themselves and all other taxpayers of the State of Ohio, complain of Defendant Central Ohio's conduct and for Croson's cause of action allege the following.

35. At all relevant times mentioned in this Complaint, Croson has provided contracting services to various clients in central Ohio.

36. It is impractical for all taxpayers of the State of Ohio to bring Defendant Central Ohio before this Court; therefore, Croson brings this action on behalf of itself and on behalf of all other taxpayers of the State of Ohio similarly situated.

37. At all relevant times mentioned in this Complaint, Defendant Central Ohio was an agency created under the laws of the State of Ohio and charged with, among other duties, planning, supervising and letting of contracts for projects for Defendant Central Ohio, including construction contracts as described throughout this Complaint.

38. Even though Croson was the lowest, most responsive and responsible company seeking the contract at issue regarding the Project, and even though Croson submitted the most cost effective proposal for the Project, Defendant Central Ohio intends to (or may have) award the contract to another bidder.

39. Defendant Central Ohio has awarded the contract at issue to Fox Mechanical Co. even though Fox Mechanical Co. failed to satisfy relevant and mandatory

requirements contained in the RFP, failed to demonstrate that it is the most qualified company to perform the contract, and engaged in collusion among the union contractor bidders through its use of the job targeting program.

40. Upon information and belief Defendant Central Ohio's factual basis for rejecting Croson's bid was in large part inaccurate, incomplete and otherwise misleading, and this rejection was done in an arbitrary manner.

41. Croson requests this Court to declare that the actions of Defendants Central Ohio and Fox Mechanical Co. are illegal and that the contract entered into is void, and that any and all payments thus far made to Fox Mechanical Co. are illegal.

FOURTH CAUSE OF ACTION

42. Croson incorporates by reference the above paragraphs as if fully rewritten herein.

43. Croson submitted the lowest and most responsive proposal for the contract in dispute as discussed above.

44. Croson is a responsible bidder as that term is used in the applicable bidding statutes, rules, and bid documents which govern the contract dispute referred to above.

45. Defendant Central Ohio awarded the contract in dispute to Fox Mechanical Co. even though its proposal was not the lowest and most responsive proposal submitted in connection with the contract dispute referred to above.

46. The contract awarded to Fox Mechanical Co. by Defendant Central Ohio is void, or voidable.

47. As a result of Defendant Central Ohio's award of the contract described above to Fox Mechanical Co., Croson suffered damages in an amount of $73,362.25.

48. As a result of the actions of Defendants Central Ohio and Fox Mechanical Co., Defendants Central Ohio and Fox Mechanical Co. are jointly and severally liable for Croson's lost profits on the Project.

WHEREFORE, Croson respectfully requests that this Court grant judgment in favor of Croson and against Defendant Central Ohio as follows:

(1) that a preliminary injunction and permanent injunction be issued restraining Defendant, its agents, officers, servants, employees and all other persons acting on behalf of or in concert with Defendant from authorizing third parties to proceed with the work covered by the RFP that is the subject of the contract for the Project;

(2) that a writ of mandamus be issued directing the Defendant to honor the proposal of Croson and execute a written contract with Croson because it is the lowest, most responsive and responsible company submitting a cost effective proposal for the Project, and that Defendant be ordered to immediately proceed with its obligations;

(3) that the Court enter a declaratory judgment declaring that the evaluation process (with respect to the Project) was not conducted in accordance with law, that Croson submitted

the lowest, most responsive and cost effective proposal, Croson is the most responsible company submitting a proposal, and that Croson is entitled to the contract for the Project;

(4) that this Court declare the contract between Fox Mechanical Co. and Defendant Central Ohio for the Project void, and that further payments to Fox Mechanical Co. are illegal;

(5) that, in the alternative, if this Court determines that Croson has an adequate remedy at law, that Croson be awarded $73,362.25, and that Defendants Central Ohio and Fox Mechanical Co. be held independently or jointly and severally liable for such award of damages;

(6) that Croson recover its attorney fees, costs and expenses incurred in maintaining this action; and

(7) that this Court order such further relief as it deems appropriate.

Respectfully submitted,

Donald W. Gregory (0021791)
Ronald L. Mason (0030110)
Todd F. Palmer (0047582)

EMENS, KEGLER, BROWN, HILL & RITTER
65 E. State Street, Suite 1800
Columbus, Ohio 43215-4294
Telephone: (614) 462-5400
Attorneys for J.A. Croson Company

VERIFICATION

_____, representative of J.A. Croson Company, states that they have read the foregoing Complaint, that this verification is upon their own knowledge, information and belief, and that they believe the allegations in the foregoing Complaint to be true.

J.A. Croson Company

By: _____

Sworn to before me and subscribed in my presence this ___ day of ___, 1994.

_____

Notary Public

_____

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing _____ has been delivered by regular U.S. Mail, postage prepaid, to Edwin L. Skeens, 41 South High Street, Suite 2600, Columbus, Ohio, 43215, Attorney for Central Ohio Joint Vocational School District and Steven W. Tigges, 1300 Huntington Center, 41 South High Street, Columbus, Ohio, 43215, Attorney for Fox Mechanical Co., on this ___ day of May, 1994.

_____

Ronald L. Mason (0030110)

TABULATION OF BIDS RECEIVED March 17, 1994 12:00 Noon, Local Time	TOLLE CENTRAL OH

CONTRACTOR	ADDENDA RECEIVER	BOND SUBMITTI
RUNER CORPORATION		
J.A CROSON COMPANY	1, 2, 3	Yes
FOX MECHANICAL	1, 2, 3	Yes
J.A. GUY, INCORPORATED		
HOLDRIDGE MECHANICAL		
MARCO PLUMBING AND HEATING	1, 2, 3	Yes
RADICO INCORPORATED	1, 2, 3	Yes
TEEPE'S RIVER CITY MECHANICAL	1, 2, 3	Yes
KIRK WILLIAMS COMPANY	1, 2, 3	Yes

EXHIBIT A

TECHNICAL CENTER EXPANSION For the Board of Education) JOINT VOCATIONAL SCHOOL DISTRICT Plain City, Ohio	Operated By Read By Tabulated By	Pamela Orr Paul J. Mullin Ronald E. Firestone

	PLUMBING CONTRACT					REMARKS
	BASE BID	ALTERNATE P-1	ALTERNATE P-2	ALTERNATE P-3		
	293,449	20,799	15,500	1,859		
	277,900	22,000	17,530	1,950		
	297,000	17,500	15,000	1,960		
-	376,400	3,600	16,400	3,100		
	350,000	28,600	15,518	1,861		
	299,630	22,000	16,000	4,500		

[Exhibit B]

NON-COLLUSION AFFIDAVIT

State of _____

County of _____

Project Name TOLLES TECHNICAL CENTER EXPANSION
CENTRAL OHIO JOINT VOCATIONAL SCHOOL DISTRICT

Contract _____

Contractor _____, being first duly sworn, deposes and says that he is _____
(sole owner,
a partner,
_____ of _____
president, secretary, etc.)

the party making the foregoing Bid; that such Bid is not made in the interest of or on behalf of any undisclosed person, partnership, company, association, organization, or corporation; that such Bid is genuine and not collusive or sham; that such Bidder has not directly or indirectly induced or solicited any other Bidder to put in a false or sham Bid, and has not directly or indirectly colluded, conspired, connived, or agreed with any Bidder or anyone else to put in a sham Bid, or that any one shall refrain from bidding; that said Bidder has not in any manner, directly or indirectly, sought by agreement, communication or conference with any one to fix the Bid rice [sic] of said Bidder or of any other Bidder, or to fix any overhead, profit, or cost element of such Bid price, or of that of any other Bidder, or to secure any advantage against the Owner awarding the contract or anyone interested in the

proposed contract; that all statements contained in such Bid are true; and, further, that said Bidder has not, directly or indirectly, submitted his Bid price or any breakdown thereof, or the contents thereof, or divulged information or data relative thereto, or paid and will not pay any fee in connection therewith, to any corporation, partnership, company, association, organization, Bid depository, or to any member or agent thereof. or to any other individual except to such person or persons as have a partnership or the financial interest with said Bidder in his general business.

Signed:

_____

Contractor

_____

Title

Subscribed and sworn to before me this ___ day of ___, 19___.

Seal of Notary

_____

930200 TTCE NON-COLLUSION AFFIDAVIT

APPENDIX F

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

INDEPENDENT ELECTRICAL CONTRACTORS OF GREATER CINCINNATI, INC.	:	Case No. A-9209065
Plaintiff	:	Judge Tracey
-v.-	:	**ENTRY AND DECISION**
COUNTY OF HAMILTON, DIVISION OF PUBLIC WORKS, ET AL.	:	[Entered Aug. 6, 1993]
Defendants	:	

This matter comes before the Court on the cross-motions for summary judgment filed by plaintiff Independent Electrical Contractors of Greater Cincinnati, Inc. ("IEC"), the City of Forest Park, ESI, Inc. and the International Brotherhood of Electrical Workers (IBEW Local 212). IEC has also filed on summary judgment against Hamilton County, which has not moved for summary judgment on its cross claim. The Court has been fully advised in the premises having reviewed the motions, memoranda, pleadings, stipulated facts, evidentiary submissions and applicable law, and having heard arguments of counsel. The Court has also reviewed the amicus curiae memoranda, to wit, that of the National Electrical Contractors Association, Inc., Ohio Conference, in support of defendant ESI, IBEW Local 212 and that of the Ohio State Building and Construction Trades Council, amicus curiae, in support of the third party defendant IBEW Local 212, the Court hereby granting the motions

for leave to file these memoranda, there being no opposition.

This matter came before the Court originally as a complaint filed by IEC alleging that Ohio's Prevailing Wage Law, R.C. Chapter 4115, was violated by defendants Hamilton County, City of Forest Park and ESI on construction project at the Hamilton County Courthouse and the Forest Park Municipal Building. IEC filed this complaint pursuant to R.C. 4115.16(B). Subsequently, a third party complaint was filed by ESI against IBEW Local 212 seeking indemnification.

In its complaint IEC maintains that the Prevailing Wage Law was violated on these construction projects because amounts were deducted from the pay of employees performing work on these jobs allegedly in excess of the normal dues and assessments permissibly deducted under Ohio's Prevailing Wage Law. IEC maintains that such deductions were also unlawful because the amounts deducted and remitted to Local 212 were used by Local 212 to fund a "market recovery" or "job targeting" program to assist a certain segment of the market, that is union electrical contractors, in obtaining construction work. On May 14, 1992, and on July 20, 1992, IEC filed complaints with the Director of the Ohio Department of Industrial Relations with respect to its allegations of this practice. However, IEC received no response from the Director. Consequently, on October 9, 1992, IEC initiated this action pursuant to R.C. 4115.16(B).

The parties agree that there is no dispute of a material fact for purposes of summary judgment. The parties

also agree that the plaintiffs have standing as an "interested party" pursuant to R.C. 4115.16 and that all statutory procedural requirements have been met by the plaintiffs.

Since at least January 1, 1990 to the present, Local 212 has maintained under its control an electrical industry advancement fund (the "Fund"), a primary purpose of which is to finance what is generally known in the construction industry as a "job targeting" or "market recovery" program. The purpose of such program is to assist electrical contractors who are signatory to a collective bargaining agreement with Local 212 to better compete with non-union contractors in bidding and securing contracts for electrical construction work by subsidizing their labor costs on selected construction jobs. This fund is financed by the working dues paid by members of Local 212.

Prior to November 1, 1991, 2% of the members' dues were placed in the Fund by Local 212 and since that date 3% of their dues have been placed in the Fund by Local 212. In addition to the amounts placed by Local 212 in the fund, members also have 2% of their gross wages withheld by the employer and remitted to Local 212 as dues. It is this deduction that plaintiff claims violates the Ohio Prevailing Wage Law. It is also undisputed that the dues deductions are pursuant to a lawful union security agreement, and that requisite written authorizations from the members were obtained.

In considering a motion for summary judgment, the narrow question the Court must decide is whether there is a "genuine issue as to any material fact and [whether]

the moving party is entitled to judgment as a matter of law." Civ. R. 56(C). The Court cannot try issues of fact on a Rule 56 motion, but is empowered to determine only whether there are any issues to be tried. *In Re Atlas Concrete Pipe, Inc.* (C.A. 6 1982), 668 F.2d 905, 908. The rule imposes a heavy burden upon the party seeking summary judgment to show the absence of issues of material fact. *Adickes v. S. H. Kress & Co.* (1970), 398 U.S. 144, 153; *Celotex Corp. v. Catrett* (1986), 477 U.S. 317, 322. *See also, Mitseff v. Wheeler* (1988), 38 Ohio St. 3d 112, 114. The moving party bears the burden of affirmatively showing that there is no genuine issue of material fact. *Mitseff, supra* at 115. Summary judgment may only be granted if reasonable minds can only conclude, based on the evidence, that judgment for the movant is appropriate.

The evidence presented on a motion for summary judgment is always construed in favor of the party opposing the motion who is given the benefit of all favorable inferences that can be drawn from it. *Williams v. First United Church of Christ* (1974), 37 Ohio St. 2d 150, 153. As the United States Supreme Court has stated, "on summary judgment the inferences to be drawn from the underlying facts contained in [the affidavits, exhibits, and depositions] must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.* (1962), 369 U.S. 654; *Day v. United Auto, Aero & Agr. Imp. Wkrs.* (1972), 466 F.2d 83, 99; *EEOC v. United Ass'n of J. & A. of Plumb. and Pipe Indust.* (C.A. 6 1970), 427 F.2d 1091, 1093, *cert. denied*, 404 U.S. 832. A summary judgment "should be used cautiously so that a litigant's

right to trial . . . is not usurped." *Norris v. Ohio Standard Oil Co.* (1982), 70 Ohio St. 2d 1, 2.

The non-moving party has a reciprocal burden of specificity. Civ. R. 56(E) provides in part: "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial." In this regard, the claimant must present some evidence with respect to those elements which the party must establish at trial. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317.

Movant defendants assert that the union deduction practice is not violative of Ohio's Prevailing Wage Law and that, at any rate, the issue is pre-empted by federal jurisdiction encompassed by the Labor Management Relations Act ("LMRA"), Section 302(c)(4), 29 U.S.C. Section 186(c)(4).

The United States Supreme Court in *San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236, 244, articulated the principle of pre-emption for purposes of the LMRA/National Labor Relations Act:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section A, due regard for the federal enactment requires that State jurisdiction must yield. To leave the State free to regulate conduct so plainly within the central aim of the federal regulation involves too great a danger of conflict

> between power asserted by the Congress and requirements imposed by State law."

The Supreme Court in *Longshoreman vs. Davis*, (1986), 476 U.S. 380, in citing this passage from *Garmon*, noted that:

> "It is apparent from these passages that a Court must first decide whether there is an arguable case for pre-emption; if there is, it must defer to the Board and only if the Board decides that the conduct is not protected or prohibited may the Court entertain the litigation."

Id. at 397. Simply put, the Court must first determine whether the state court or the National Labor Relations Board has jurisdiction over the dispute. "If there is pre-emption under *Garmon*, then State jurisdiction is extinguished." *Id.* at 391. This occurs, the court in *Garmon* noted:

> "[w]hen an activity is arguably subject to Section 7 or Section 8 of the Act [29 USC Section 157 or Section 158], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

359 U.S. at 245.

Plaintiff ESI asserts that the deductions from wages of employees who worked on the Hamilton County Courthouse and Forest Park Municipal Building projects, used to fund job targeting programs, are illegal under Ohio Administrative Codes Section 4101:9-4-07(B)(6)

which prohibits employer deductions of "special assessments" from employee wages:

> "(B) The following *deductions* from wages *may be made* only if, prior to the commencement of work by the employee on any project, employers procure and maintain in writing proof of voluntary deductions signed by the employee: * * *
>
> (6) Any deductions *to pay regular union initiation fees and membership dues, not* including fines or *special assessments* . . . provided that a collective bargaining agreement between the employer and representatives of employees permits such deductions and such deductions are not otherwise prohibited by law."

(Emphasis added.)

29 USC Section 186 (C)(4), Section 302(c)(4) of the Labor Management Relations Act, however, authorizes such deductions. While it provides that, "It shall be unlawful for any employer . . . to pay, lend, or deliver . . . any money or thing of value to a labor organization," it excepts employer payments to labor organizations made pursuant to the terms of "dues check off" arrangements:

> "The provisions of this section shall not be applicable . . . (4) *with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided,* That the employer has received from each employee on whose account the deductions are made a written assignment which shall not be irrevocable for a period of more than one year or beyond

> the termination date of the applicable bargaining agreement, whichever occurs sooner."

Section 302(4) therefore does not contain the limiting language of the corresponding Ohio Administrative Code Section, 4101:9-4-07(B)(6), which would not permit the deduction of fines and special assessments.

Section 302(c)(4) articulates the requisite conditions for the lawful deduction of membership dues from the wages of employees. The issue obviously is whether Congress intended the term "membership dues" contained in Section 302(c)(4) to include the type of special deduction made here. Federal courts have considered just such an issue and have held that this section does permit the deduction of special assessments from employee wages. *See e.g., International Union of Mine Mill Workers Local 515 v. American Zinc, Lead and Smelting Co.* (9th Cir. 1963), 311 F.2d 656 (holding a special strike assessment does constitute a "membership dues" within the meaning of 302(c)(4)).

In *San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236, the Supreme Court noted the importance of determination of such issues at a national level:

> Regardless of the mode . . . "[to] allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.
>
> At times it has not been clear whether the particular activity regulated by the State was governed by the Section 7 or Section 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the

> Act that these determinations be left in the first instance for the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State power and State jurisdiction too must yield to the exclusive primary confidence of the Board."

(Citations omitted.) *Id.* at 244, 245.

Along this line, the National Labor Relations Board ("NLRB") has held that the areas of dues check off is pre-empted from state regulation by NLRA Sections 302(c)(4). *See Shen-mar Food Prods. Inc.* (1976), 221 NLRB 1329, 1330 and enf'd as mod. 537 F.2d 396 4th Cir. 1977, in which the NLRB held:

> " . . . matters concerning dues check off authorization and labor agreements implementing such authorizations are exclusively within the domain of Federal law having been pre-empted by the National Labor Relations Act and removed from the provision of Section 14(B) by operation of Section 302."

Consequently, the determination of whether an inconsistency exists between Section 302(c)(4) and Ohio regulations is pre-empted by federal law, as it necessarily involves defining permissible "membership dues" pursuant to Section 302(c)(4). Moreover, to the extent that LMRA Section 302(c)(4) permits employers to deduct special assessments from the wages of their employees and remit them to the employees' exclusive bargaining representative, here IBEW, Local 212, the state's regulation is pre-empted by federal law.

For the foregoing [sic] reasons, then, this Court finds it lacks subject matter jurisdiction to enforce the

prohibition in the Ohio Administrative Code, Section 4101:9-4-07(B)(6) of special assessments as deductions from employee wages, the area being pre-empted by 302(c)(4) of the Labor Management Relations Act. With this determination, the Court finds it unnecessary to address the other issues raised in the motions.

There being no question of a material fact, and the moving defendants being entitled to summary judgment as a matter of law, the Court finds the defendants' motions for summary judgment are well-taken and they are granted. Costs are awarded to defendants. For the same reason, with respect to the plaintiff's motion for summary judgment against the defendants, the Court finds it not well-taken and it is denied.

For whatever reason, defendant Hamilton County has not responded to plainitff's [sic] motion nor has it filed its own summary judgment motion. Civ. R. 12 (H)(3) provides:

> "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

For the foregoing reasons, then, the action is dismissed against Hamilton County pursuant to Civ. R. 12(H)(3).

SO ORDERED.

APPENDIX G

IN THE COURT OF COMMON PLEAS, PICKAWAY COUNTY, OHIO

J.A. CROSON CO., Plaintiff,	:	No. 93-CI-000094
v.	:	
J.A. GUY, INC., Defendant and Third-Party Plaintiff,	:	**OPINION**
vs.	:	(Filed March 28, 1995)
United Associated of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 189, Third-Party Defendant.	:	

KNECE, P. RANDALL, JUDGE:

Plaintiff J.A. Croson Company ("Croson") is a mechanical contractor with its principal place of business in Franklin County, Ohio.

Defendant J.A. Guy, Inc., is a mechanical contractor incorporated in the State of Ohio with its principal place of business in Franklin County, Ohio. J.A. Guy, Inc.'s employees are members of and are represented by Third-Party Defendant United Association of Journeymen and Apprentices of the Plumbers and Pipe Fitters Industry of the United States and Canada Local 189 ("Local 189"). It

appears that Croson was an unsuccessful bidder for construction of the water softening system for the new Pickaway County Jail. Croson claims that defendant J.A. Guy, Inc. violated the Ohio prevailing wage statute by deducting 2% of the gross wages paid its employees as a "Market Recovery Assessment." ("Assessment"). The Assessment is then paid by J.A. Guy, Inc. to Local 189.

J.A. Guy, Inc. and Local 189 are parties to a collective bargaining agreement in which J.A. Guy, Inc. agreed to withhold union dues from the pay checks [sic] of employees who signed proper authorizations and to send the money directly to Local 189. The amount of dues is set by the Union and its members; J.A. Guy, Inc. has no say in the amount of dues or their use. However, it is conceded that a portion of the dues are used for job targeting programs. A job targeting program is the payment of money by a union to a union contractor, such as J.A. Guy, Inc., on a specific job. This payment in effect lowers the union contractor's cost on the project improved [sic] by the union. The money for this program is paid out of a specific fund. Union members contribute money to this fund. They generally do this through some means of dues deduction. For example, Local 189 of the Plumbers and Pipe Fitters Union requires their members to pay 2% of gross wages to the union job targeting fund.

Plaintiff contends that all Plumbers and Pipe Fitters Local unions operating in the State of Ohio have a similar type of assessment. This means that for every job that is a public job (requiring the payment of prevailing wages) that 2% of the gross wages paid by union contractors to members of Local 189 (and other local plumbers unions)

are funneled directly to the union's job targeting program.

Plaintiff contends that Ohio has an anti-kick back [sic] statute for all prevailing wage jobs in Ohio. Specifically, plaintiff cites the Court to Ohio Revised Code Section 4115.10 (D). This statute prohibits workers from being required to give away part of their wages with the possibility of the employee loosing [sic] his job if the payments are not made. There is, however, an exemption for labor unions for the "collection of dues or assessments of such organization."

Plaintiff contends that every plumbers union has a requirement in its contract that employers must deduct for union dues and assessments. Every employee is required to be a member of the union. Failure to pay all dues and assessments is grounds to deny these people membership in the union. Any employee who refuses to pay into a job targeting fund is subject to discharge because the union will deny them membership in their union which is a condition of their employment with the contractor.

The regulations that interpret the Ohio Prevailing Wage Statute allow for the deduction of "regular union initiation fees and membership dues." *Ohio Admin. Code* Sections 4101:9-4-07 (B) (6). Deductions of union "assessments" are specifically excluded from this section of the regulation. *Id.*

With respect to assessments, another regulation section states that other than normal dues, no other assessments can be deducted from the workers' wages without the specific approval of the public authority and the

director and that the assessment must meet certain criteria, one of which is the following:

> "The employer does not make a profit or benefit directly or indirectly from the deduction in any form, including, but not limited to, commission or dividends." See Ohio Admin. Code, Section 4101:9-4-07 (C) (2).

The gravamen of plaintiff's complaint is that J.A. Guy, Inc. violated R.C. Section 4115.07 by deducting 2% of the gross wage paid to its employees on the water softening system for the new Pickaway County Jail for "Market Recovery Assessment."

On June 15, 1993, J.A. Croson Company filed a complaint pursuant to Ohio Revised Code Section 4115.16 (B) against J.A. Guy, Inc. alleging that it violated the prevailing wage law, R.C. Chapter 4115. Plaintiff contends that J.A. Guy, Inc. made illegal deductions from the prevailing wage of employees working on the Pickaway County Jail of monies that were placed in the job targeting program fund. On July 21, 1993, J.A. Guy, Inc. filed a third-party complaint for indemnification against Local 189.

J.A. Croson Co. filed a motion for summary judgment. Defendant J.A. Guy, Inc. and third-party defendant Local 189 also filed motions for summary judgment in which they allege that the matter is pre-empted by federal law.

In *San Diego Bldg. Trades Council v. Garmon* (1959), 359 U.S. 236, the U.S. Supreme Court held:

> "[w]hen an activity is arguably subject to (section) 7 or (section) 8 of the [National Labor Relations] Act, the States as well as the federal

> courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with the national policy is to be averted." *Id.* at 245.

The *Garmon* doctrine is designed to prevent conflict between state and local regulation and Congress's "integrated scheme of regulation" embodied in the National Labor Relations Act, Sections 157 and 158, Title 29, U.S. Code. In passing the NLRA, Congress "largely displaced state regulation of industrial relations." *Wisconsin Dept. of Industry, Labor & Human Relations v. Gould, Inc.*, (1986) 475 U.S. 282.

In *Communication Workers of America v. Beck* (1988), 487 U.S. 735, the U.S. Supreme Court noted that section 8 (a) (3) of the NLRA permits an employer and exclusive bargaining representative to enter into an agreement requiring all employees in the bargaining unit to pay periodic union dues as a condition of continued employment. *Id.* at 738. The Court found that a challenge to the use of union dues for purposes other than collective bargaining is subject to Section 8 and therefore preempted under *Garmon*.

The NLRA "leaves the substantive terms of collective bargaining agreements to management and union representatives to hammer out in the collective bargaining process." *Cannon v. Edgar* (C.A.7, 1994), 33 F.3d 880. Application of the Prevailing Wage Law as urged by J.A. Croson Company would allow the state to regulate the amount of union dues which could be withheld from members' paychecks and the purposes to which those dues could be put. J.A. Croson Company's characterization of the case is irrelevant, see *Bldrs. Assn. v. Commercial*

Piping Co. (1982), 70 O. St. 2d 9 at 14; it actually seeks to have the state control matters at the heart of the collective bargaining process, which is regulated by the NLRA. Under J.A. Croson Company's interpretation, J.A. Guy, Inc. could only comply with the prevailing wage law by breaching its duty to remit union dues under the collective bargaining agreement, a violation of section 8 of the NLRA. Therefore, the Court concludes that the issue is preempted under *Garmon*.

For the foregoing reasons, the Court hereby grants the motions for summary judgment as filed by defendant and third-party plaintiff, J.A. Guy, Inc., and third-party defendant Local 189. The Court overrules J.A. Croson Company's motion for summary judgment.

Counsel for J.A. Guy, Inc. shall prepare and circulate an entry reflecting this decision.

/s/ P. Randall Knece
P. RANDALL KNECE, JUDGE

03-27-95

APPEARANCES:

ON BEHALF OF PLAINTIFF,
J.A. CROSON CO.:

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ON BEHALF OF DEFENDANT AND
THIRD-PARTY PLAINTIFF,
J.A. GUY, INC.:

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Edwin L. Skeens, Esquire
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ON BEHALF OF THIRD-PARTY
DEFENDANT, LOCAL 189:

Orla E. Collier, III, Esquire
BENESCH, FRIEDLANDER, COPLAN
& ARONOFF
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Columbus, Ohio 43215

APPENDIX H

Not Reported in F.Supp.
2 Wage & Hour Cas.2d (BNA) 1530
(Cite as: 1995 WL 606778 (N.D.Ga.))

ASSOCIATED BUILDERS AND CONTRACTORS OF GEORGIA, INC.; Georgia Branch, Association of General Contractors of America, Inc., and the Independent Electrical Contractors; in Representation of Their Members

v.

CITY OF ATLANTA and North Georgia Building and Construction Trades Council, AFL-CIO.

Civ. No. 1:94-cv-2012-ODE.

United States District Court, N.D. Georgia, Atlanta Division.

Aug. 5, 1995.

James Roy Weathersby, Mark L. Keenan, Ogletree Deakins Nash Smoak & Stewart, Atlanta, GA, for plaintiffs Associated Builders and Contractors of Georgia, Inc., Association of General Contractors of America, Inc., Georgia Branch, the Independent Electrical Contractors.

Clifford E. Hardwick, IV, Mary Janet Huber, Jerolyn Yvette Webb Ferrari, Office of Atlanta City Attorney, Atlanta, GA, for defendant City of Atlanta.

Robert S. Giolito, Stanford Fagan & Giolito, Atlanta, GA, Terry R. Yellig, Sherman Dunn Cohen Leifer & Yellig, Washington, DC, for defendant North Georgia Building and Construction Trades Council, AFL-CIO.

ORDER

ORINDA D. EVANS, District Judge.

*1 This civil action is before the court on Plaintiffs' motion for a preliminary injunction, motion to strike the memorandum of points and authorities of Defendant North Georgia Building and Construction Trades Council, AFL-CIO ("Trades Council"), and motion for permission to submit new case authority. Also before the court are the request of Defendant City of Atlanta ("City") for permission to cite new authority in support of the City's response to the motion for preliminary injunction and the Trades Council's motion to accept intervenor's memorandum and motion for leave to file a supplemental memorandum.

Plaintiffs are trade groups that represent a number of different construction companies. They seek a declaratory judgment that the City's prevailing wage ordinance ("PWO") is invalid, with corresponding permanent injunctive relief. At a hearing in open court on November 4, 1994, the parties presented argument and evidence regarding Plaintiffs' motion for a preliminary injunction. During the hearing, the court granted the Trades Council's motion to intervene as a party defendant. Also during the hearing, the parties agreed to the court's suggestion that, pursuant to Fed.R.Civ.P. 65(a)(2), it treat the hearing as a final hearing on the merits of Plaintiffs' claim for permanent injunctive relief. Following the hearing, Plaintiffs and the Trades Council filed additional briefs and evidence.

"Permanent injunctive relief is appropriate if (1) plaintiffs are successful on the merits of their claim, (2)

there is no available remedy at law and (3) the balance of equities favors granting such relief." Travellers Int'l AG v. Trans World Airlines, 722 F. Supp. 1087, 1096 (S.D.N.Y. 1989), aff'd, 41 F.3d 1570 (1994); accord Walgreen Co. v. Sara Creek Property Co., 775 F. Supp. 1192, 1197 (E.D. Wis. 1991) (citing Travellers Int'l), aff'd, 966 F.2d 273 (1992); see Ciba-Geigy Corp. v. Bolar Pharm. Co., 747 F.2d 844, 850 (3d Cir. 1984), cert. denied, 471 U.S. 1137 (1985). The court first discusses whether Plaintiffs have proved the merits of their claims.

The portion of the PWO at issue states as follows: "Unless otherwise required or when federally assisted, when a construction project exceeds the sum of $10,000, the prevailing wages paid shall correspond as nearly as practicable to the prevailing wages prescribed in the federal Davis Bacon Act." City of Atlanta Code of Ordinances ("Atlanta Code") §5-5088(1). The "federal Davis Bacon Act" the PWO refers to is the Davis-Bacon Act, as amended, 40 U.S.C. §§276a to 276a-5. It defines "prevailing wages" as follows:

> (1) the basic hourly rate of pay; and
>
> (2) the amount of –
>
> (A) the rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and
>
> (B) the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforcible [sic] commitment to carry out a financially responsible plan or program which was communicated in

writing to the laborers and mechanics affected, *2 for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits:

Provided, That the obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determination of the Secretary or Labor, insofar as sections 276a to 276a-5 of this title and other Acts incorporating sections 276a to 276a-5 of this title by reference are concerned may be discharged by the making of payments in cash, by the making of contributions of a type referred to in paragraph (2)(A), or by the assumption of an enforcible [sic] commitment to bear the costs of a plan or program of a type referred to in paragraph (2)(B), or any combination thereof, where the aggregate of any such payments, contributions, and costs is not less than the rate of pay described in paragraph (1) plus the amount referred to in paragraph (2).

40 U.S.C. §276a(b) (emphasis in original).

Plaintiffs assert that the PWO is invalid on three grounds: First, the PWO is unconstitutionally vague. Second, the National Labor Relations Act, as amended ("NLRA"), 29 U.S.C. §§151-169, preempts the PWO. Finally, the Employee Retirement Income Security Act, as

amended ("ERISA"), 29 U.S.C. ss1001-1461, preempts the PWO. The court finds that the first two grounds lack merit and Plaintiffs lack standing to assert the third ground.

VAGUENESS

Plaintiffs argue that the phrase "as nearly as practicable" makes the PWO unconstitutionally vague. Specifically, Plaintiffs contend that because "as nearly as practicable" is not defined, "city contractors are provided no guidance as to the level of wages and benefits required to be paid under the ordinance." (Plaintiffs' Mem. of Law in Supp. of Their Motion for a Prel. Injunc. at 26.) Moreover, Plaintiffs assert that the PWO's vagueness places them in danger of civil and criminal penalties, as well as arbitrary and discriminatory enforcement of the PWO by city officials.

To succeed on their vagueness claim, Plaintiffs "must demonstrate that the [PWO] is impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982). The stringency with which courts review a law challenged as vague turns on the nature of the enactment. Id., 455 U.S. at 498.

> [E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the

> meaning of the regulation by its own inquiry, or by resort to an administrative process.

*3 Id. (footnotes omitted). Courts also defer more to laws with only civil penalties for noncompliance, as well as to laws that do not threaten constitutionally-protected rights such as the right of free speech or of association. Id. at 498-99.

Three facts compel the court to find that a less strict vagueness standard applies here. First, the PWO on its face is economic regulation. Second, no criminal penalties attend a violation of the PWO.[1] Third, Plaintiffs do not allege that the PWO threatens any constitutionally-protected conduct.

Applying a less strict vagueness test, the court at the outset notes that the use of the phrase "as nearly as practicable" in statutes is commonplace. Cf., e.g., 5 U.S.C. §5347(b); 7 U.S.C. §55(a); 15 U.S.C. §1126(d)(2); 23 U.S.C. §101(b); 33 U.S.C. §988(b)(4); 39 U.S.C. §3625(d); 43 U.S.C. § 1552(a); & 49 U.S.C. §10781(a)(3). However, the most significant fact that persuades the court to reject Plaintiffs' vagueness argument is Plaintiffs' failure to produce any evidence that the City has ever charged any of Plaintiffs' members with violating the PWO, even though the

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[1] Plaintiffs argue that a failure to comply with the PWO can lead to criminal penalties. The City concedes that the State of Georgia has given it the ability to impose misdemeanor penalties for violations of its ordinances. City of Atlanta Charter §1-103(b). However, the City notes that the Atlanta City Council has prescribed only civil penalties for violations of the PWO. See Atlanta Code §5-5157; see also Aff. of Michael Sullivan, dated Sep. 26, 1994, P3. Plaintiffs do not respond to the City's evidence.

PWO was enacted in 1983. Indeed, Plaintiffs' evidence shows that their members can and have complied with the PWO in the past. The president of one of Plaintiffs' members concedes that his company has "complied with the ordinance to avoid criminal prosecution and the possible debarment from submitting future bids or being awarded future contracts." (Statement of John Cochran, dated Oct. 13, 1994, P 4.) Three other company presidents whose statements Plaintiffs have provided make the identical admission. Given this evidence, it appears that Plaintiffs' members can comply with the PWO if they choose. Therefore, the PWO is not unconstitutionally vague.

NLRA PREEMPTION

The NLRA does not contain an express preemption provision. However, it has been interpreted to preempt state and local regulation of areas that Congress has left "to be controlled by the free play of economic forces." Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 144 (1976). Plaintiffs assert that the City strayed into this prohibited area when it enacted the PWO.

The City responds to Plaintiffs' argument by noting that the Machinists decision did not invalidate the power of States and localities to enact laws establishing minimum employment standards. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755 (1985); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 20-22. The power of States and localities in this regard survives because

"[m]inimum state labor standards affect union and non-union employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." Metropolitan Life, 471 U.S. at 755. The City goes on to note that the Supreme Court has expressly recognized that the Davis-Bacon Act "on its face . . . is a minimum wage law designed for the benefit of construction workers." Universities Research Ass'n v. Coutu, 450 U.S. 754, 771 (1981). The City thus argues that a locality does not intrude into the preemptive zone that Congress implicitly established for "the free play of economic forces" when the locality incorporates a federal minimum wage statute into a local ordinance.

*4 Plaintiffs make no credible response to the City's Coutu-based argument. The court finds the argument persuasive, and therefore finds that Plaintiffs have failed to prevail on the merits of their NLRA preemption claim.

ERISA PREEMPTION

In its post-hearing brief, the Trades Council first argues that Plaintiffs lack standing to seek invalidation of the PWO under ERISA. The court agrees.

Plaintiffs argue that ERISA preempts Atlanta's PWO. In order to be entitled to make this argument, a plaintiff must have rights or obligations under the federal statute. See Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 107 & n.4 (1989); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (One of the essential elements of standing analysis for purposes of the Constitution's "case or controversy" requirement is that the plaintiff "have suffered an 'injury in fact' – an invasion of

a legally-protected interest.") (emphasis added). However, Plaintiffs have pointed to no rights that their members have under ERISA. Cf. 29 U.S.C. §1001 (ERISA exists to protect participants and beneficiaries); cf. also 29 U.S.C. § 1132(a) (right of action for violation of ERISA limited to participants, beneficiaries, and fiduciaries). While Plaintiffs' members probably do have obligations under ERISA, the relationship between the PWO and Plaintiffs' members' ERISA plans is vague because neither the members nor their plans are before the court.[2] Because the record fails to reflect that Plaintiffs have sustained a concrete injury, Plaintiffs have failed to establish that they have standing to seek a determination that ERISA preempts the PWO.

CONCLUSION

Accordingly, Plaintiffs' motion for a preliminary injunction [#4-1], which, pursuant to the agreement of the

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[2] The record does contain certain conclusory statements by Cochran, president of Georgia Specialty Constructors, Inc., Morris Purcel, president of Putzel Electrical Contractors, Inc., Larry Beasley, senior vice-president of McDevitt Street Bovis, Inc., and Robert L. McCullough, president of All South Sprinkler. (Plaintiffs provided two statements each for Cochran and McCullough.) Cochran's and McCullough's initial statements and the statements of Purcel and Beasley are largely the same. Cochran asserts with little elaboration that his company "was required to continuously calculate, monitor and alter its benefits for certain employees during the time it performed construction work subject to the prevailing wage ordinance." (Cochran Statement, P7). This identical assertion is repeated in each of the other statements. These assertions are insufficient to convince the court that the PWO "relates to" an ERISA benefit plan.

parties, the court treats as a motion for permanent injunction, and motion to strike [#21-1] are DENIED. Plaintiffs' motion for permission to submit new case authority [#30-1], the City's request for permission to cite new authority in support of the City's response to the motion for preliminary injunction [#7-1], and the Trades Council's motion to accept intervenor's memorandum [#22-1] and motion for leave to file a supplemental memorandum [#31-1] are GRANTED. Count I of Plaintiffs' complaint [#1-1] is DISMISSED. The Clerk is DIRECTED to enter judgment for Defendants on the remaining counts in Plaintiffs' complaint.

SO ORDERED.

END OF DOCUMENT

APPENDIX I

Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 provides:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

APPENDIX J

SUBSIDIZING CONTRACTORS TO GAIN EMPLOYMENT: CONSTRUCTION UNION "JOB TARGETING"

Herbert R. Northrup*

Augustus T. White**

In response to the decline in construction union membership and expanding market penetration of open shop construction, construction unions have employed job targeting as a means of regaining their market share. Formal job targeting arrangements provide for an increase in membership dues to establish a fund which is used to gap the difference between the targeted wage and regular union scale. As a result, the union contractor has lower costs but workers realize the full wage scale. The experience of the International Brotherhood of Electrical Workers (IBEW) working in cooperation with the National Electrical Contractors Association (NECA) demonstrates how job targeting programs can increase construction unions' market share at the expense of open shop contractors and contribute to an increase in construction union membership. However, because job targeting unions lack the resources to target the largest projects, the effects of job targeting have

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**Member, Youngblood and White, P.L.L.C., Houston, Texas. B.A., 1973, New College; Ph.D., 1980, Johns Hopkins University; J.D., 1981, Yale University.

primarily been on small and mid-sized jobs. While job targeting has contributed to IBEW and other construction union membership, it has not had a substantial effect.

Opponents of job targeting have attacked these arrangements on several fronts. Job targeting arrangements on federally financed construction projects have been attacked under the anti-kickback provisions of the Copeland and Davis-Bacon Acts. Targeting funds were found to act as a rebate scheme which benefits contractors, not merely as union dues. As a result, unions may target federally funded jobs but cannot assess employees working on public projects for targeting. Job targeting programs have similarly been attacked on the state level in those jurisdictions with "Little Davis-Bacon" prevailing wage statutes. Although cases are pending in state courts, unions have enjoyed limited success by arguing that dues are governed by federal labor policy which preempts the state laws. Because the core values of the NLRA are not threatened by by [sic] *state determinations of what constitutes "wages," it is likely that future litigation will reach the merits of these cases. Job targeting on private construction projects has also been brought pursuant to anti-trust laws. A NECA job targeting program was alleged to have violated the Sherman Act and constitute a conspiracy to exclude open shop contractors from the local market. Although the district court granted summary judgment to NECA, finding that the program was exempt from antitrust scrutiny under labor exemptions, the case is currently on appeal and may be reversed. Future courts should reach a determination of what job targeting programs, if any, constitute an antitrust violation. Finally, job targeting may be subject to attack under as yet untested theories, including the provisions of section 302 of the NLRA. The legal analysis of job*

targeting programs is at a formative stage. As future cases are tried on the merits, the law will undoubtedly be clarified.

I. Construction Union Decline And Policies To Regain Jobs

A. Innovative Policies to Attempt to Regain Union Market Share

II. Development and Nature of Job Targeting

A. Project Agreements and Informal Job Targeting

B. Development of Formal Job Targeting

C. Pinpointing

D. Organization of Funded Job Targeting

E. Job Targeting Administration and Results in the Portland Area

F. The Extent and General Impact of Job Targeting

III. The Legal Attack on Job Targeting

A. Davis-Bacon Act Litigation

B. State "Little Davis-Bacon" Acts

C. Antitrust Litigation

D. The Path Not Taken – NLRA Section 302

IV. Conclusion

This article examines union action to gain jobs by subsidizing unionized contractors with funds deducted from workers' pay checks. The avowed purpose is to assist these contractors to compete successfully with non-union (open shop) contractors, thereby to win bids for unionized construction contractors and jobs for union members, and to dominate the market for such work and

jobs. The development of this job-winning technique is described, cases are analyzed, and legal countermeasures used by or potentially available to contractors are examined against the background of the decline of construction unions and the minority share of construction work now being performed by unionized contractors.

I

Construction Union Decline And Policies To Regain Jobs

In 1973, the AFL-CIO building and construction unions enrolled 40 percent of the construction industry labor force as members;[1] by 1994, this proportion was only 18.8 percent.[2] Meanwhile, the construction labor force grew by approximately 1.5 million from 1980 to 1995.[3] In the first nationwide study of the market

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[1] Construction Labor Research Council, Construction Industry Union Employment as a Percentage of Total 2 (April 1981); Herbert R. Northrup, Open Shop Construction Revisited 102-103, n.7 (1984) [hereinafter Northrup, Open Shop].

[2] Bureau of Labor Statistics, U.S. Dep't of Labor, *Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, 42 Employment and Earnings No. 1, 216, tbl. 42 (1995). Union membership data are published annually in the Bureau of Labor Statistics' monthly journal, Employment and Earnings, usually in the January issue but sometimes in the February one. They are then reprinted in the Daily Labor Report (BNA).

[3] Bureau of Labor Statistics, U.S. Dep't of Labor, *Employed Persons by Industry and Occupation*, 27 Employment and Earnings No. 7, 56, tbl. A-24 (1980) (indicating total construction employment of 6.4 million); Bureau of Labor Statistics, U.S. Dep't of Labor, *Employed Persons by Industry and Occupation*, 42 Employment and Earnings No. 7, 32, tbl. A-19 (1995) (indicating total

penetration of open shop construction, it was estimated that in 1975, "it appears likely that the open-shop builders are in the majority and probably control 50 to 60 percent of the total work."[4] A second nationwide study, made nine years later, concluded:

> that the dollar volume of construction produced by unionized craftsmen is not likely to exceed 30 percent of the total. . . . During the years since 1970, open shop construction has increased in the sectors and regions in which it has historically dominated. At the same time, sectors and regions which traditionally have been union strongholds have been significantly penetrated by the open shop.[5]

No study of this nature has been published since 1984, but based upon regular monitoring of the field, the

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construction employment of 7.9 million). Data on the construction labor force are published monthly in EMPLOYMENT AND EARNINGS. This growth has been uneven and varied by sectors of the industry. Hard hit by the recession of the early 1990's, construction employment, after increasing by almost one million workers in the 1970's, lost nearly one-half of these gains by 1982 but has since recovered. 1 EMPLOYMENT, HOURS AND EARNINGS, United States, 1909-90 No. 5, 38 (1991). The increased employment of the 1990's, however, has been heavily in homebuilding, which is about 90 percent open shop nationally. NORTHRUP, OPEN SHOP, *supra* note 1, at 65. The urban, high-rise commercial building sector remains in a serious slump because of high vacancy rates resulting from overbuilding during the 1980s. *Id.* at 157. Since this latter sector is a cornerstone of construction union strength, its continued slump has contributed to union decline in recent years. *Id.* at 157-58, 161-63, 189.

[4] HERBERT R. NORTHRUP & HOWARD G. FOSTER, OPEN SHOP CONSTRUCTION 351 (1975).

[5] NORTHRUP, OPEN SHOP, *supra* note 1, at 27-28.

open shop share of the construction dollar has probably stabilized at 70-80 percent of the total market.[6]

A Innovative Policies to Attempt to Regain Union Market Share

In response to this decline, construction unions and unionized contractors have developed economic and political initiatives to bolster or protect their memberships and businesses. Many contractors have either broken with unions and now operate open shop, or have developed or purchased an open shop company and now operate "doublebreasted"; i.e., they have two separate firms: one union and the other open shop. This permits them to bid on jobs regardless of the union orientation in a given sector or area.[7]

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[6] These estimates are based upon regular monitoring of association, contractor, and union contacts and publications. For case studies in one area in which union construction virtually collapsed, and in another in which union control has largely been maintained, *compare* Herbert R. Northrup, *Arizona Construction Labor: A Case Study of Union Decline*, 11 J. LAB. RES. 161 (1990) *with* Herbert R. Northrup, *The Status and Future of Unionized Construction in New Jersey*, 4 N.J. BUILDING CONTRACTOR 9 (1991).

[7] *See* Herbert R. Northrup, *Construction Doublebreasted Operations and Pre-Hire Agreements: Assessing the Issues*, 10 J. LAB. RES. 215, 219-22 (1989) [hereinafter Northrup, *Assessing the Issues*]; Herbert R. Northrup, *Doublebreasted Operations and the Decline of Construction Unionism*, 16 J. LAB. RES. 379, 380 (1995) [hereinafter Northrup, *Construction Unionism*].

Unions and contractors have also negotiated agreements removing or modifying numerous restraints to productivity and flexibility of operations, although many such restraints remain in agreements in some localities.[8] Union wage and benefit increases have declined dramatically since 1980. In 1994, such increases averaged 2.7 percent for the first year and 3.0 percent for the second year in multi-year agreements[9] whereas they often exceeded 10 percent annually, 1965-1980.[10]

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[8] The Construction Labor Research Council (CLRC), the research institute for unionized contractors, has placed "terms and conditions" costs in union construction for 1993 at $2.18 per hour. It noted that although the percentage costs of contract terms and conditions declined in the 1980s, absolute costs have risen as the industry wage and fringe rate has increased. *See* CONSTRUCTION LABOR RESEARCH COUNCIL, COSTS OF TERMS AND CONDITIONS IN COLLECTIVE BARGAINING AGREEMENTS 2 (Mar. 1994). *See also* ASSOCIATED GENERAL CONTRACTORS BASIC TRADES COMMITTEE, CONSTRUCTION LABOR RESEARCH COUNCIL, COST REDUCING MODIFICATIONS TO CONSTRUCTION COLLECTIVE BARGAINING AGREEMENTS (1992). A preliminary result of another CLRC study has found a marked improvement in local union restrictive practices and a reduction in jurisdictional disputes. *See Study Reports Improvement in Local Labor Practices*, 40 CONSTRUCTION LAB. REP. (BNA) 766 (Oct. 12, 1994).

[9] *See* CONSTRUCTION LABOR RESEARCH COUNCIL, 1995 CONSTRUCTION LABOR TRENDS AND OUTLOOK 1 (Feb. 1995); CONSTRUCTION LABOR RESEARCH COUNCIL, WAGE AND BENEFIT SETTLEMENTS IN CONSTRUCTION 1994 1 (Dec. 1994). Wage and benefits settlements during the 1960s and 1970s can be found in annual publications of the Bureau of Labor Statistics entitled *Wage and Benefits: Building Trades*. This series was discontinued after 1981.

[10] *See, e.g.*, NORTHRUP, OPEN SHOP, *supra* note 1, at 322 fig. VIII-1 (indicating an 11 percent increase in wage plus benefit rate in 1980).

The construction unions, however, have determined that economic actions are insufficient to regain their market share. They have, therefore, embarked upon both political and direct action programs. Politically, construction unions have been pushing several proposed laws that would enhance their power.[11] They are also

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[11] A proposal by the construction unions would amend the Employee Retirement Income Security Act of 1974 (ERISA) to provide that it will not preempt state laws requiring payment of prevailing wages and benefits on public projects, regulating apprenticeship and training, or providing for collections of multi-employer plan contributions from open shop contractors. Its purpose is to reverse court decisions which have prevented states from denying open shop contractors accreditation of training programs, enacting prevailing wage laws, and requiring contributions of open shop companies to union welfare and pension plans. *See* Operating Eng'rs & Participating Employers Pre-Apprentice, Apprentice, & Jrny'mn Affirmative Action Fund v. Weiss Bros. Constr. Co., 270 Cal. Rptr. 786 (Cal. Ct. App. 1990), *cert. denied*, 499 U.S. 931 (1991); Hydrostorage, Inc. v. Northern Cal. Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719 (9th Cir. 1989), *cert. denied*, 498 U.S. 822 (1990); Electrical Joint Apprenticeship Comm. v. McDonald, 949 F.2d 270 (9th Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992). The unions have achieved a victory in an appeals court decision which ruled that ERISA does not preempt state "Little Davis-Bacon" (prevailing wage) acts. *See* Keystone Chapter, Associated Builders and Contractors, Inc. v. Foley, 37 F.3d 945 (3d Cir. 1994) *cert. denied*, 115 S. Ct. 1393 (1995). *But see* General Elec. Co. v. New York Dep't of Labor, 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990); Associated Builders & Contractors v. Perry, 869 F. Supp. 1239 (E.D. Mich. 1994). Both cases found state "Little Davis-Bacon" laws to be preempted by ERISA because of regulation of contractor employee benefits.

Other legislation supported by the construction unions would expand the coverage of the Davis-Bacon Act (which is now being threatened with repeal by Congress), and outlaw

pressuring local governments to require all-union agreements that would preclude the use of open shop contractors on major projects.[12]

The direct action union programs include "salting," – having union members or organizers take jobs with open shop contractors in order to organize the employees and to disrupt their operations;[13] utilizing environmental permitting processes to delay or threaten to delay, the issuance of permits, and thereby induce users or financiers of

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doublebreasted operations. *See generally* Northrup, *Assessing the Issues, supra* note 7. For union success in almost eliminating the use of helpers on federally funded projects, see Herbert R. Northrup, *The "Helper" Controversy in the Construction Industry*, 13 J. Lab. Res. 422 (1992) [hereinafter Northrup, *The "Helper" Controversy*].

[12] The United States Supreme Court ruled that such agreements are lawful. *See* Building & Constr. Trades Council v. Associated Builders & Contractors, 113 S. Ct. 1190 (1993) (*Boston Harbor*). Such agreements, however, may run afoul of state competitive bidding laws. *See* George Harms Constr. Co. v. New Jersey Turnpike Authority, 644 A.2d 76, 90-91 (N.J. 1994). *But see* New York State Chapter v. New York State Thruway Auth., 620 N.Y.S.2d 855, 858 (N.Y. App. Div. 1994). This latter case has found no conflict between *Boston Harbor* type project agreements and state procurement laws. The New York case has, however, been accepted for review by New York State's highest court. *See New York Appellate Court Agrees to Review Project Agreement Cases*, Daily Lab. Rep. (BNA), No. 132, at A-3 (July 11, 1995); New York State Chapter v. New York State Thruway Auth., 1995 N.Y. LEXIS 2678 (N.Y. July 6, 1995).

[13] *See* Herbert R. Northrup, *"Salting" the Contractors' Labor Force: Construction Unions Organizing with NLRB Assistance*, 14 J. Lab. Res. 469 (1993) [hereinafter Northrup, *Salting*].

construction to award contracts to unionized contractors;[14] and job targeting, the subject of this article.

II

Development and Nature of Job Targeting

Job targeting can take several forms. Some such efforts have existed for many years. Earlier versions did not involve the transfer of funds from unions or job funds to the contractor; some have reduced wages for a project, or waived various contractual provisions. Current union tactics, however, provide for more sophisticated arrangements.

A Project Agreements and Informal Job Targeting

A limited form of job targeting, project agreements, has existed for many years. Under such arrangements, a separate collective agreement is negotiated which applies only to the project at hand and which establishes project terms separate from other local contracts. Such agreements are more likely to provide less restrictive rules and conditions than to reduce the area's standard wage scale, but a lower wage scale is not unknown. In areas where construction unions are weak, project agreements often have more drastic wage concessions. Project agreements,

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[14] *See* Herbert R. Northrup & Augustus T. White, *Construction Union Use of Environmental Regulation to Win Jobs: Cases, Impact, and Legal Challenges*, 18 Harv. J. L. & Pub. Pol'y ___ (Fall 1995).

unlike new forms of job targeting, are typically negotiated for very large projects.[15]

A significant project agreement is the National Construction Stabilization Agreement between approximately ten large, unionized contractors, the Building and Construction Trades Department, AFL-CIO, and approximately twelve building trades unions. It lays down basic conditions of work which may be more advantageous to contractors than such conditions in many local agreements, but provides for the payment of locally-negotiated wages and benefits.[16]

Particularly in times of recession, unions may agree to waive the contractual wage scale and work for less; they may also agree to forego contributions to benefit plans in order to save or to win jobs. Such agreements may be formal or informal, but the object is the same: to increase the competitiveness of unionized contractors. Informal arrangements, of course, are more likely to occur on small jobs involving small contractors and a small work force. During the severe recession of the early

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[15] *See* NORTHRUP, OPEN SHOP, *supra* note 1, at 228-30. Information on project agreements is based upon Dr. Northrup's field research in the industry which has extended over many years. In the course of this work, a number of project agreements have been collected, and many others examined. In all cases, respondents to both personal and telephone interviews have demanded anonymity as a condition of cooperation.

[16] National Construction Stabilization Agreement, Operational Procedures for the Joint Administrative Committee (November 1991) (on file with author).

1980s, many such arrangements were found.[17] Union officials often look the other way when these arrangements violate the contract, because they keep people working and preserve the union scale. When business improves and employment expands, the informal arrangements are fought by the union and many disappear.[18]

B Development of Formal Job Targeting

The current form of funded job targeting appears to have been initiated during the early 1980s. Several construction unions have utilized it. For example, the Sheet Metal Workers International Association (SMWIA), in cooperation with the Sheet Metal and Air Conditioning Contractors National Association (SMACNA), has such a program.[19] Annual surveys by SMACNA of its chapters found that job targeting was "available to combat non-union competition" in 28.8 percent of the chapters reporting in 1991, and this increased to 57.4 percent of those reporting in 1994.[20]

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[17] *See* NORTHRUP OPEN SHOP, *supra* note 1, at 348-49. During the field research for the Open Shop Construction Revisited book, Dr. Northrup examined many such arrangements. Usually no names were mentioned, but both contractors and union officials freely admitted that these arrangements existed. The union officials stated that by keeping things "informal," the union scale was more likely to be maintained for the day when business conditions improved.

[18] *Id.*

[19] *See Toning the Union Muscles*, ENGINEERING NEWS-RECORD, Apr. 26, 1990, at 36, 38.

[20] SHEET METAL AND AIR CONDITIONING CONTRACTORS NAT'L ASS'N, INC., 1991 LABOR RELATIONS ANALYSIS OF THE STATE OF THE

The International Brotherhood of Electrical Workers (IBEW), in cooperation with the National Electrical Contractors Association (NECA), has probably been the most active practitioner of job targeting.[21] For this reason, and because key litigation, as discussed in Part III below, has provided considerable material for analyzing job targeting, the authors concentrate on the IBEW experience.

IBEW's venture into job targeting apparently began in the Kansas City area, a traditionally union area in which the open shop was making some gains, and then developed in other jurisdictions.[22] Targeting has had the full support of the national officials of IBEW and NECA as part of a "market recovery program" which they urged their local affiliates to develop.[23] The IBEW established a

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UNIONIZED SHEET METAL INDUSTRY 12 (1991); SHEET METAL AND AIR CONDITIONING CONTRACTORS NAT'L ASS'N, INC., 1994 ANNUAL LABOR REPORT 10 (1994).

[21] *See, e.g.*, Phoenix Elec. Co. v. National Elec. Contractors Ass'n, 861 F. Supp. 1498 (D. Or. 1994). Both unionized and open shop contractors and association executives contacted for this study were unanimous that the IBEW was the biggest player in job targeting.

[22] Jack Metzgar, *Buying the Job*, 6 LAB. RES. REV. 51, 53 (1987).

[23] *See, e.g., Target Program Approved*, IBEW J., Aug. 1995, at 34 (reporting targeting actions by Local 508, Savannah, Ga.). Several local NECA chapter personnel have told this to Dr. Northrup. The IBEW Journal in its monthly reports on local union activities lists more targeting by local unions than does any other building trades union journal which is regularly consulted.

"Special Products Department" to encourage organization, and this Department has been in the forefront both of "salting"[24] and job targeting tactics.[25]

Prior to April 1995, the IBEW national officers encouraged and supported job targeting as part of a strong organizing program aimed at securing a monopoly of the local labor markets.[26] In April 1995, however, the IBEW president issued a new policy in which targeting was discouraged, because it was found to depress wages, particularly on government-funded construction. The emphasis was shifted entirely to organizing, with salting as a major tactic.[27] As discussed in Part III below, targeting has been found to be illegal on federally funded projects and caused California authorities to lower the "prevailing" wages on state funded ones. Nevertheless, local unions continue to utilize this tactic. According to Michael Lucas, executive assistant to IBEW's president, although no more job targeting programs will be created, and the IBEW's "stated intention was to do it only as long

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[24] *See* Northrup, *Salting*, *supra* note 13, at 473-75.

[25] *See supra* notes 22-23 and accompanying text.

[26] *See, e.g., Resolutions Committee Report, Resolution No. 50,* 1991 PROC. 34TH CONVENTION IBEW 103-04 (1991); J.J. Barry, Keynote Address, 34th Convention of the IBEW (Oct. 7, 1991), *in* 1991 PROC. 34TH CONVENTION IBEW 123, 127-28 (1991). Mr. Barry also sent to all IBEW local unions a video encouraging the use of all organizing tools, including job targeting (on file with author).

[27] INTERNATIONAL OFFICE, INTERNATIONAL BHD. OF ELEC. WORKERS, I. O. POLICY ON INSIDE CONSTRUCTION ORGANIZING 8-9 (April 18, 1995) [hereinafter INSIDE CONSTRUCTION ORGANIZING].

as we had to. . . . [I]t's not the end of targeting."[28] Moreover, local unions which have utilized targeting have not indicated that they will cease doing so, and some are clearly continuing to target. For example, local union reports issued six months or more after the issuance of the IBEW's new organizing policy described targeting actions.[29]

NECA is a full partner in job targeting programs. In 1987, NECA announced a policy which declared that it would no longer serve open shop contractors and in effect invited such contractors to leave the organization.[30] Henceforth, NECA stated that labor relations would be its most important function, that it would seek even closer ties with the IBEW, and that it would serve only signatory (unionized) contractors.[31] Although the NECA chapters are supposedly independent corporations, the national organization has considerable power over them. For example, it forced the Puget Sound (Seattle) chapter

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[28] *IBEW Drops Targeting and Boosts Organizing*, ENGINEERING NEWS-RECORD, July 17, 1995, at 15.

[29] *See Target Program Approved*, *supra* note 23; *Job Targeting Success*, IBEW J., Sept. 1995, at 34 (reporting on Local 141, Wheeling, W. Va.).

[30] NATIONAL ELEC. CONTRACTORS ASS'N, LONG RANGE PLAN REPORT – GOALS AND OBJECTIVES (Mar. 2, 1987) [hereinafter NECA REPORT]. SPEAKING TO THE 1991 IBEW CONVENTION, THE PRESIDENT OF NECA STATED: "MOST RECENTLY, WE HAVE COMMITTED THE RESOURCES FROM BOTH OF OUR ORGANIZATIONS [IBEW AND NECA], NATIONALLY AND LOCALLY, TO A PROGRAM TO TELL THE BUYERS OF CONSTRUCTION SERVICES THAT THEIR BEST CHOICE IS TO USE NECA ELECTRICAL CONTRACTORS WHO EMPLOY IBEW ELECTRICIANS." *See* 1991 PROC. 34TH CONVENTION IBEW, *supra* note 26, at 406.

[31] NECA REPORT, *supra* note 30, at 2.

to divest its open shop manpower and hiring hall recruiting program.[32] Today, NECA chapters play a leading administrative role in job targeting, and cooperate fully with IBEW local unions for this purpose.

Typically, job targeting is initiated by an agreement for a "market recovery program" between the local union and the local association chapter. For example, the 1985-86 agreement between Local Union No. 48 and the Oregon-Columbia Chapter, NECA, which covers the Portland, Oregon, region, was amended in April 1985 as follows:

> Where the union deems it necessary to protect the jurisdiction of the . . . [IBEW], the union will, prior to the bidding process or letting of a contract for a particular project, consider a modification of the wages as outlined in the current collective bargaining agreement. Should the union consent to a modification of the labor agreement for a particular project, the modification shall apply only to the project in question until its completion. . . .[33]

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[32] The Puget Sound chapter filed a charge with the National Labor Relations Board (NLRB) claiming that the national NECA and the local IBEW union violated section 8(e) of the National Labor Relations Act (NLRA). 29 U.S.C.A. 158(e) (West 1978). An administrative law judge found in the chapter's favor, but the NLRB reversed, stating it was "particularly reluctant" to enter this "unique statutory treatment." International Bhd. of Elec. Workers, Local 46 and Puget Sound Chapter, Nat'l Elec. Contractors Ass'n, 303 N.L.R.B. 48 (1991).

[33] Amendment to Agreement Between Local No. 48, International Bhd. of Elec. Workers, and the Oregon-Columbia Chapter, National Elec. Contractors Ass'n (Apr. 23, 1985).

C Pinpointing

Many of the earlier job targeting programs were established under a procedure that has since become known as a "pinpointing" plan. It provided that unionized contractors wishing to bid on a job for which open shop contractors were also bidding, would notify the local NECA chapter, which passed the information to the local IBEW officials.[34] If the local IBEW leadership determined that concessions would be appropriate, it notified its NECA counterpart of what reductions would be in order, and in turn, the chapter would notify the area's unionized contractors.[35] The unionized contractors would then bid the job on the basis of a lower wage scale or other concessions granted by the union.[36] Thus, pinpointing is essentially a project agreement which provides for less than standard union wage scales.

The idea of working for less than scale has never been very appealing to the union membership generally. This is especially true in a local union, where some members would be working at full scale and others for various lesser amounts, depending upon what the union business agents felt was necessary to assist in winning bids. Unlike a traditional major project agreement, which could employ the bulk of a local union membership over a long

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[34] *See* Phoenix Elec. Co. v. National Elec. Contractors Ass'n, No. 91-436-JE (D. Or. Feb. 24, 1994) (magistrate's findings and recommendations); Phoenix Elec. Co. v. National Elec. Contractors Ass'n, 861 F. Supp. 1498, 1504 (D. Or. 1994) For discussion of the legal aspects *see infra* Part III.

[35] *Phoenix Electric*, 861 F. Supp. at 1504.

[36] *Id.*

period, pinpointed jobs tended to be much smaller projects employing a much fewer number for shorter periods.[37] Assignment of work to the pinpointed jobs rather than to the full scale jobs, therefore, became an internal political problem to the local union wherever it was adopted.[38] As a result, pinpointing soon vanished from the scene.[39] It gave way to the funded job targeting plan.

D Organization of Funded Job Targeting

The typical job targeting program now provides for ā local agreement between the IBEW local union and the local chapter of NECA under which dues are increased, sometimes after contracts were modified and wages increased, to provide for the establishment of a fund which is used to make up the difference between the

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[37] Actually, neither pinponting or [sic] funded job targeting as now practiced are utilized for very large jobs, because the local unions cannot raise enough funding for major construction. The significance of job targeting from a labor market viewpoint is that it is utilized mainly in smaller commercial jobs which in recent years have been heavily open shop.

[38] *See, e.g.*, Deposition of Edward Barnes, Business Agent of Local Union 48, IBEW at 111, *Phoenix Electric* (91-436-JE) (on file with author) [hereinafter Barnes Deposition]; Deposition of Timothy Gauthier, Secretary-Manager, Oregon-Columbia Chapter, NECA at 33, *Phoenix Electric* (91-436-JE) (on file with author). Both testify about the problems caused by having some union employees working for lesser amounts than others under their pinpointing plan which preceded the funding plan.

[39] Telephone calls around the country in mid-1994 failed to find any pinpointing plans still extant.

targeted wage and the regular union scale. If, for example, a 10 percent wage concession was approved by the local union for a targeted project, and the unionized contractor was awarded the job, union members would still receive the full wage scale because the 10 percent wage reduction would be made up from the targeting fund. The unionized contractor would thus have lower costs, but the workers would not have lower wages. As the Regional Director of NECA explained: "the difference between the pinpoint program and the MRP [market recovery program for targeting] is that 'where you use pinpointing, the members of the local union receive various wage rates. With the funded job targeting program, the [union employees] all receive the same wage.' "[40]

Initially in several localities, the union paid the difference in wages directly to the employees working on targeted jobs.[41] This made the union responsible for fringe benefits, workers' compensation, and other supplements associated with wages and benefits, plus "an enormous amount of paperwork for the union, as it had to keep track of each hour worked by each member on a targeted job and then issue checks to each as the work proceeded."[42]

As a result of this experience, the procedure has been changed. Now on targeted jobs, the common approach is for the union to make a grant directly to the contractor

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[40] Plaintiffs' Objections to Finding and Recommendations of the Magistrate, at 13, *Phoenix Electric* (91-436-JE) [hereinafter Plaintiffs' Objections].

[41] Metzgar, *supra* note 22, at 53.

[42] *Id.*

who wins the job. All wages are thus paid directly by the contractor who has been subsidized. As discussed in Part III, this approach has generated considerable litigation which is still active.

E Job Targeting Administration and Results in the Portland Area

Job targeting is financed by assessing a percentage of wages, which varies among local unions. It is usually between 2 and 5 percent; it is 3.5 percent in the Local No. 48-Portland area NECA program.[43] The assessment is checked off by the contractor and paid to the union.[44] The union puts the money in a special fund and has complete control over its disposition, but is likely to confer with the executive of the contractor association before determining the amount to be dispersed in a given situation.[45]

IBEW Local No. 48 has developed a form for contractors to use when they request a grant from this fund. It provides for the project name and address, the amount of grant requested, additional contractors involved, and the names of the prospective open shop competitor bidders.[46] The form is then sent to the NECA Portland chapter, which must discuss it with Local 48's business manager and then return it to the IBEW local before any funding is

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[43] Barnes Deposition, *supra* note 38, at 112-15, 142-45.

[44] *Id.*

[45] *Id.*

[46] Exhibits to Plaintiff ABC's Motion for Partial Summary Judgment at 119, *Phoenix Electric* (91-436-JE) (Market Recovery Program Form, Plaintiffs' Exhibit 80).

paid out.[47] A decision is then made and approved by the business agent as to the amount of grant, if any. NECA is told of the IBEW action and makes the information available to all signatory contractors.[48] If a signatory contractor wins the bid, the grant is paid directly to his company.[49] In turn, the contractor makes weekly reports to the IBEW local concerning the man hours utilized, wages paid, and other pertinent information until the job is completed.[50]

Job targeting is popular with unionized contractors generally, and by all reports has been successful in winning jobs for them and work for union members.[51] In the Portland area, unionized contractors' market share, which stood at about 90 percent in 1975, had declined to less than 50 percent by 1985.[52] Following the introduction

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[47] Barnes Deposition, *supra* note 38, at 144; Exhibits to Plaintiff's Opposition to Defendant's Motion for Summary Judgment on Labor Exemption Issue at 50, *Phoenix Electric* (91-436-JE) (Market Recovery Program Local Union #48 Letter) [hereinafter Exhibits on Labor Exemption Issue].

[48] Barnes Deposition, *supra* note 38, at 145-46.

[49] *Id.*

[50] *Id.* at 145; Exhibits on Labor Exemption Issue, *supra* note 47, at 50-51.

[51] *See* Barbara Marsh, *Local Unions Are Helping Small Contractors Win Work*, WALL ST. J., Nov. 10, 1992, at B2 (reporting job gains in Portland and other cities). *See also Job Targeting Becomes Potent Union Weapon*, COCKSHAW'S LAB. NEWS + OPINION, July 1993, at 1 [hereinafter *Job Targeting*].

[52] These are Local 48's data based upon compilations that it regularly ran and were produced in the *Phoenix Electric* case. *See, e.g.*, Plaintiffs' Exhibit A at 5, 92, 70-72, and 142-47; E at 175-76, 205-18; and J at 335-45, i. 376.

of job targeting, the unionized share rose to over 80 percent by 1992.[53]

Several of the largest open shop electrical contractors, including Tigard, the original lead plaintiff against NECA and the IBEW in *Phoenix Electric*,[54] now on appeal to the Ninth Circuit Court of Appeals,[55] have become signatory contractors because of a loss of work. Other Portland area open shop contractors testified that they did not bid on a number of jobs or lost many others because of the targeting program.[56]

The secretary of the IBEW has declared that:

> Local 48 and the Portland NECA Chapter provide an excellent example of what can be accomplished by cooperation. The spirit of cooperation there has allowed the IBEW and NECA to recapture and dominate the electrical industry. . . . [T]here is no end to what could be achieved if IBEW locals and NECA chapters nationwide showed the same spirit of cooperation.[57]

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[53] *Id.*

[54] 861 F. Supp. 1498. The original case, when filed, listed Tigard Electric as the first named plaintiff.

[55] *Phoenix Electric*, 861 F. Supp. 1498, *appeal docketed*, No. 94-35522 (9th Cir.).

[56] *See generally* Affidavit of James A. Hirte, *Phoenix Electric* (91-436-JE); Affidavit of Steven D. Deacon, *Phoenix Electric* (91-436-JE); Deposition of William Wallace Mehrens, *Phoenix Electric* (91-436-JE); Deposition of Frank Vandeventer, *Phoenix Electric* (91-436-JE); Deposition of David Myers, *Phoenix Electric* (91-436-JE).

[57] *Focus on Cooperation*, IBEW J., Jan.-Feb. 1989, at 8.

F The Extent and General Impact of Job Targeting

In other parts of the country, there is considerable evidence that job targeting has increased the unionized sector's share of work in the electrical contracting industry. As early as 1992, the then president of the Associated Builders and Contractors (ABC), the largest open shop contractors association (which includes a substantial membership of electrical contractors), and which is, of course, very opposed to job targeting, stated that the effect of job targeting programs are being felt by non-union builders across the country: "It's rampant, it's spreading, and it is no longer the tool of one or two unions. We are receiving reports that virtually every [building trades] union is engaged in a kickback scheme."[58] The Associated General Contractors (AGC), whose membership is about equally divided between unionized and open shop contractors, has likewise adopted a policy opposing job targeting.[59]

Job targeting among IBEW local unions and NECA local chapters is regularly reported in the monthly IBEW JOURNAL and in labor relations and business reports. The WALL STREET JOURNAL carried an article showing the success of the IBEW and other union plans.[60] The Daily Labor Report (BNA) has noted the inclusion of targeting

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[58] *ABC Announces Employee Benefit Plan, Assesses Job Targeting at Convention*, Construction Lab. Rep. (BNA) No. 38, at 61 (Mar. 18, 1992).

[59] *Associated General Contractors Adopts Policy Opposing Job Targeting Programs*, Construction Lab. Rep. (BNA) No. 38, at 939 (Nov. 4, 1992).

[60] Marsh, *supra* note 51, at B2.

arrangements in new contracts.[61] Cocci reported after a telephone survey that the IBEW "is now winning jobs in . . . such 'merit shop' (open shop) bastions as Oklahoma, Mississippi, Georgia and Maine."[62] Local Union No. 569, San Diego, announced that its program "had funded 43 jobs, generating more than 127,223 journeyman . . . man-hours."[63] Similar successes have been reported by local unions in Madison, Wisconsin,[64] San Jose, California,[65] and Minneapolis, Minnesota,[66] among others. For Detroit, the IBEW JOURNAL carried a picture of the business agent of Local Union No. 58 presenting its first targeting check to a contractor.[67] Even very large electrical contractors like Shambaugh & Son, Inc., located in Fort Wayne, Indiana, report that "union job-targeting programs allowing the relaxation of some work rules and partial wage subsidies help the firm compete."[68] It is apparent from these reports that the utilization of job targeting has been widespread and often successful.

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[61] *Electrical Workers Reach Agreements with Contractors in Southern California*, Daily Lab. Rep. (BNA) No. 113, at A-4 (June 11, 1992).

[62] *Job Targeting, supra* note 51, at 1.

[63] *A Bang-Up Year*, IBEW J., Mar. 1993, at 29.

[64] *See Target Program Works*, IBEW J., Mar. 1994, at 24.

[65] *See Market Recovery Program*, IBEW J., Oct. 1993, at 27.

[66] *See Market Recovery Fund Works!*, IBEW J., Aug. 1993, at 23.

[67] *Targeting Program Pays Off*, IBEW J., Dec. 1993, at 21.

[68] *Shambaugh: Specialty Design-Build*, ENGINEERING NEWS-RECORD, Feb. 7, 1994, at 25.

Where job targeting exists, it can be advantageous to unionized contractors and unions even if the subsidized unionized contractors fail to win jobs. Thus IBEW Local No. 1253, Augusta, Maine, reported:

> The open shops are paying close attention to these [targeted] jobs being lost, most notably in the Bangor area, and are lowering their bids and profit margins frantically to win their share of bids. Even when we are unsuccessful in winning a targeted job, there is a payoff in the fact that the nonunion takes the job at bare-bones prices.[69]

As already noted, evidence was presented in the *Phoenix Electric* case that job targeting has resulted in fewer bids by open shop contractors and that where such bids are absent, and targeting is not utilized, bid prices tend to be substantially higher than where any open shop electrical contractor bids.[70] Additionally, as already noted, several open shop contractors have been forced to sign union agreements to remain in business, and others have gone out of business.[71]

A minus for the job targeting union is that it may have a divisive effect on a local in which "travelers" (union members from a different local union) are referred for jobs because of full employment of the home union members. This occurred in IBEW Local Union 357, Nevada, in which 12 travelers refused to pay a 2 percent targeting assessment on the grounds that the assessment

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[69] *Market Recovery Successes,* IBEW J., Mar. 1994, at 31.

[70] Plaintiffs' Objections, *supra* note 40, at 6-7.

[71] *Id.* at 7-8.

was illegal, and were sued by the local.[72] The Court of Appeals for the Ninth Circuit found for the travelers because they were working on jobs covered by the Davis-Bacon prevailing wage law.[73]

The impact on IBEW membership overall is difficult to ascertain. Formerly, NECA produced the best yearly data nationwide and by state concerning the union/non-union division of work in a single craft. In 1972, the first year in which the NECA data were published, 37 percent of the 33,189 inside electrical employers and 55 percent of the 327,411 employees in this trade were governed by IBEW contracts.[74] By 1989, the last year for which these data were published, only 15 percent of the 58,644 employers and 29 percent of the 542,597 employees were so situated.[75]

No such data have been published since the 1989 were released.[76] The IBEW secretary reported to the 1991

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[72] International Bhd. of Elec. Workers v. Brock, 1995 WL 613624, at *11 (9th Cir. Oct. 20, 1995). As discussed in Part III, the nature of the Davis-Bacon Act which provides for the setting of "prevailing wages" on government funded jobs, and the fact that in Building & Constr. Trades Dep't v. Reich, 40 F.3d 1275 (D.C. Cir. 1994), job targeting for Davis-Bacon covered jobs had already been declared illegal. *See infra* Part III.

[73] *Brock*, 1995 WL 613624, at *32.

[74] *IBEW and Other Inside Electrical Employers and Employees United States, 1972-1989, in* NECA CHAPTER ALERT (National Elec. Contractors Ass'n, Bethesda, Md.) June 12, 1991.

[75] *Id.*

[76] Why NECA ceased publicizing these data is not known, but the suspicion of the authors is that the continued decline was embarrassing to the IBEW, as well as to NECA, and that its

convention that membership had declined from a little over 1 million to approximately 900,000 between 1986 and 1991, but these data include IBEW membership in manufacturing, utilities, and railroads, as well as in construction.[77] In mid-1994, the IBEW secretary announced that the union's "Construction Branch membership numbers are beginning to improve. Losses of . . . membership have slowed, almost to a stop."[78] During the period 1991-1993, nearly all AFL-CIO unions, including construction unions, suffered membership losses according to the per capita payments to the AFL-CIO.[79]

These data are somewhat contradicted by a new survey for 1989-1992 made by NECA.[80] This report revises the methodology of the previous annual reports, eliminates all white-collar occupations from its survey, and thereby raises its alleged market share for employers from 15 percent to 36 percent in 1989, which declined to 34 percent in 1992; and for employees, from 29 percent to 38 percent in 1989, which grew to 50 percent in 1992.[81] It

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market recovery programs have not been successful enough to stem the tide. *See infra* notes 77-78 for evidence to that effect.

[77] *Report of International President*, OFFICERS' REPORT TO THE 34TH CONVENTION OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS 63 (1991).

[78] *Building a Better Life for the IBEW Family*, IBEW J., July 1994, at 2.

[79] *AFL-CIO Membership Drops Significantly to Early 1970s Levels; Few Unions Gain*, Construction Lab. Rep. (BNA) No. 39, at 826 (Oct. 6, 1993).

[80] NATIONAL ELEC. CONTRACTORS ASS'N, SPECIAL REPORT. INSIDE CONSTRUCTION TRENDS: 1989-1992 (1995).

[81] *Id.*

appears likely also from the data and the observations just quoted from publications and officials that much of homebuilding and small commercial work, which is overwhelmingly done open shop, is not included in these revised surveys. Unfortunately, no pre-targeting comparisons can be made because of the incompatibility of the former and present surveys.

Any idea that job targeting or other programs had made a major impact on IBEW's control of the market was shattered by President J.J. Barry in his policy statement of April 18, 1995, in which he declared that the national union's support of job targeting would cease.[82] He also noted that the IBEW market share stood at 30 percent.[83] Moreover, AFL-CIO statistics on paid membership of affiliates, issued in October 1995, showed that the IBEW had lost 31,000 members between 1993 and 1995.[84]

Job targeting and salting, of which the IBEW is also a major practitioner, has no doubt affected membership trends, but it should be emphasized that job targeting affects only the small and mid-sized jobs. The job targeting local unions do not have the funds to target multi-million dollar projects and, therefore, do not affect large numbers of workers.[85] On the other hand, job targeting

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[82] INSIDE CONSTRUCTION ORGANIZING, *supra* note 27, at 8-9.

[83] *Id.* at 4.

[84] *AFL-CIO Statistics on Paid Membership of Union Affiliates Prepared for Federation's 21st Constitutional Convention*, Daily Lab. Rep. (BNA) No. 197, at E-4 (Oct. 12, 1995). It is not known the extent to which these IBEW membership losses were in industries other than construction.

[85] *See supra* note 37.

has been effective mainly in the commercial sector of construction in which the open shop has made the greatest gains.[86] There is no question that this has impacted the nonunion sector adversely. President Barry, however, noted that "the commercial/retail construction market . . . is presently dominated by the merit [open] shop."[87]

Meanwhile, membership in all construction trades is being hurt by the continued depression in high-rise center-city office buildings, a major source of union jobs historically.[88] It would be fair to conclude, therefore, that job targeting has had a positive impact on IBEW and other construction union membership, but the extent of any gains is unlikely to have been substantial.

III

The Legal Attack on Job Targeting

As one might expect, opponents of job targeting have mounted a number of legal attacks on the system. These challenges have been pursued in three distinct situations: (a) on federally-subsidized projects subject to the Davis-Bacon Act; (b) on projects governed by state "Little Davis-Bacon" laws; and (c) on purely private construction projects. Cases in these three groups are discussed below, followed by as-yet untried avenues of litigation which may be tested in the future.

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[86] *See* Northrup, Open Shop, *supra* note 1, at 65-96.

[87] Inside Construction Organizing, *supra* note 27, at 10.

[88] *See* Northrup, Open Shop, *supra* note 1, at 188.

A Davis-Bacon Act Litigation

The Davis-Bacon Act of 1931[89] fixed wage rates and a variety of related terms of employment on federally financed construction projects. The original Act predated the New Deal and was based on laws adopted by a number of state legislatures before the Depression.[90] The political impetus behind the original Act is somewhat unclear. Like many local labor laws, before and since, it may have been aimed at protecting local construction labor forces against competition from minorities and other low-wage outsiders.[91] Consistent with the caution of the Hoover years, however, the original 1931 Act was relatively limited and toothless.

After the election of Franklin Roosevelt in 1932, the federal government sought to aggressively counter wage deflation. The New Deal economic response to the Depression was based on the precept that, in times of recession, the government should use deficit spending to put cash into the hands of consumers. Consumers would then purchase goods, thus increasing demand, raising prices and stimulating production, which would in turn generate more wage income. To this end, the Federal Government embarked on a number of public works and

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[89] Davis-Bacon Act, ch. 411, 46 Stat. 1494 (1931) (codified as amended at 40 U.S.C.A. §§ 276a-276a-5 (West 1986)).

[90] ARMAND J. THIEBLOT, JR., PREVAILING WAGE LEGISLATION: THE DAVIS-BACON ACT, STATE "LITTLE DAVIS-BACON" ACTS, THE WALSH-HEALEY ACT, AND THE SERVICE CONTRACT ACT 25 (Labor Rel. & Pub. Pol'y Series No. 27, 1986).

[91] *Id.* at 28.

welfare programs. These included a wave of public construction projects designed to put more cash into the pockets of construction workers.[92]

Clearly, this program would not be effective if contractors were able to require employees to kickback their wages to the employer. To avoid this dis-economy, as well as to remedy an obvious injustice, Congress in 1934 passed the Copeland Anti-Kickback Act (Copeland).[93] Copeland is a criminal provision which prohibits a federal contractor from requiring employees to kick back wages.[94] The Davis-Bacon amendments of the following year took the principle a step farther and put the Act in its modern form.[95] Copeland combated deflation by prohibiting evasion of federal wage supports.[96] Davis-Bacon now acts by specifying, in advance, the wage level that would be supported.[97] Under Davis-Bacon, contractors are required to pay the "prevailing wage" in a given locality.[98] The rationale here may have been that, since part of the ultimate objective was to raise incomes, the

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[92] W. Carl Bivien, ECONOMICS AND PUBLIC POLICY 53-57 (1966).

[93] 18 U.S.C.A. § 874 (West 1976).

[94] *Id.*

[95] *See* 49 Stat. 1011 (1935).

[96] 18 U.S.C.A. § 874 (West 1976).

[97] 40 U.S.C.A. § 276a(a) (West 1986).

[98] *Id.* Not surprisingly, the "prevailing" wage, as determined by the Department of Labor, frequently turned out to be the union scale, especially prior to the reforms made in Davis-Bacon administration during the 1980s.

price paid for labor on public works should not inadvertently *lower* the local wage scale by bidding it down below existing market levels.

In addition to fixing the price of labor, Davis-Bacon also broadened the protections provided by the Copeland Act, by requiring the payment of specified wages "without subsequent deduction or rebate on any account."[99] This is clearly much more expansive language than Copeland, which addresses only reductions by "force, intimidation or threat."[100] The Department of Labor's regulations accurately reflect this expansiveness.[101] The regulations prohibit all deductions which could benefit the contractor in any way[102] and specifically permit deductions only for regular union initiation fees and dues, exclusive of fines and special assessments.[103]

In 1988, the ABC challenged job targeting under the anti-kickback provisions of the Copeland and Davis-Bacon Acts by way of a request for a ruling from the Administrator of the Wage and Hour Division of the Department of Labor.[104] ABC charged that the funds collected by the union and paid to contractors for use in the

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[99] 40 U.S.C.A. § 276a(a).

[100] 18 U.S.C.A. § 874.

[101] *See* 29 C.F.R. §§ 3.1-3.11 (1995).

[102] 29 C.F.R. § 3.6(a) (1994).

[103] 29 C.F.R. § 3.5. (1994).

[104] A discussion of the background of this action can be found in the Court of Appeals opinion, Building & Constr. Trades Dep't v. Reich, 40 F.3d 1275, 1277-79 (D.C. Cir. 1994). *See also* International Bhd. of Elec. Workers v. Brock, 1995 WL 613624 (9th Cir. Oct. 20, 1995).

job targeting program were kickbacks which violated the Copeland Act.[105] The Administrator rejected this argument, but did find that the union deductions from Davis-Bacon wages violated the prevailing wage requirements of the Act,[106] as well as the requirements of the Department of Labor's regulations accompanying Davis-Bacon.[107]

The union appealed the ruling to the Wage Appeal Board,[108] arguing that the job targeting deductions were permissible under 29 C.F.R. 3.5(i) as union dues. The Board, however, upheld the decision of the Administrator, finding the deductions more akin to special assessments specifically prohibited by the regulations than to dues allowed by section 3.5(i).[109] Further, although no court had directly addressed the question under Davis-Bacon, the Board considered and applied the Supreme Court's understanding of "union dues" as explained in *Communications Workers of America v. Beck*.[110]

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[105] *Reich*, 40 F.3d at 1277-78.

[106] 40 U.S.C.A. § 276a(a) (West 1976).

[107] *See* 29 C.F.R. §§ 3.1-3.11 (1995).

[108] *In re* Building & Constr. Trades Unions Job Targeting Programs, No. 90-02 (W.A.B. 1991).

[109] *Id.*

[110] 487 U.S. 735 (1988). In *Beck*, the Court held that dues allowable under section 8(a)(3) of the NLRA, 29 U.S.C.A. 158(a) (West 1978), were limited to assessments used to "perform . . . the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues," (quoting Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984)), such as collective bargaining, contract administration, and grievance adjustment.

The union then sought review in federal district court,[111] and, most recently, to the District of Columbia Court of Appeals.[112] The battle lines have remained relatively static, and the Department's position has been affirmed against attacks from both the unions and ABC at each step.[113] Thus, as matters currently stand, the unions may target federally funded jobs. They may not, however, assess employees working on public projects for targeting.

More recently, the Ninth Circuit has endorsed the same view in *International Brotherhood of Electrical Workers, Local 357 v. Brock*.[114] The court held broadly that a subsequent deduction or rebate, even if paid directly or "voluntarily" by the employee by the employee to the targeting fund, is impermissible under the Davis-Bacon Act.[115] Like the D.C. Circuit, the Ninth Circuit also held that these payments cannot be characterized as union dues. A precise definition of "union dues" is lacking in both opinions; however, both Circuits appear to believe that union dues are assessments which are regular, uniform, and used for traditional union services and administration, i.e., the same line drawn by the Supreme Court in *Beck*.

Although this resolution may appear to be only a minor impediment to job targeting, it may have considerable practical significance because it creates difficult

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[111] Building & Constr. Trades Dep't v. Reich, 815 F. Supp. 484 (D. D. C. 1993), *aff'd*, 40 F.3d 1275 (D.C. Cir. 1994).

[112] Building & Constr. Trades Dep't v. Reich, 40 F.3d 1275 (D.C. Cir. 1994).

[113] *See supra* notes 104-112 and accompanying text.

[114] 1995 WL 613624 (9th Cir. Oct. 20, 1995).

[115] *Id.* at *10.

political problems for the unions. First, targeting is structured precisely to prevent any wage differential between targeted and scale jobs. By prohibiting targeting deductions on Davis-Bacon projects, the Court of Appeals decisions reimpose a wage differential which cannot be eliminated. Second, the "prevailing" wage, as determined by the Department, is often a very close approximation to the union scale.[116] Precisely because of open shop competition, actual wage and benefit packages in the private sector are frequently below scale, in practice if not in theory. Thus, union members working on Davis-Bacon jobs may already receive a higher rate than many members working on private sector projects. The privately employed members are sure to be somewhat skeptical of a proposal that they give up part of their wages to subsidize a group which is already receiving a higher rate and which does not itself contribute to the subsidy fund.

B State "Little Davis-Bacon" Acts

Thirty-three states have enacted "Little Davis-Bacon" prevailing wage statutes which have not been repealed.[117] Unlike the federal scheme, the various state statutes seem to be based less on a coherent economic program than on a vague desire to assist the construction industry and, more particularly, unionized construction

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[116] *See supra* note 98.

[117] Nine states repealed such laws in recent years. *See* Northrup, *The "Helper" Controversy, supra* note 12, at 433 n. 10.

workers. Nevertheless, the state statutes typically faithfully parrot the language of the Davis-Bacon Act, including its anti-kickback language.[118] As a result, job targeting programs have been attacked on a state level, using the arguments similar to those made by ABC in the federal proceedings: that contributions by unions *to* contractors are improper and that contributions *from* union employees on state projects should be considered rebates, or at least not counted toward the contractor's prevailing wage obligation. As on the federal level, virtually all of the actual dispute has been on the latter point.

Most of the litigation to date has been under the Ohio[119] and California[120] statutes which, for present purposes, closely approximate Davis-Bacon. Presently, there are a number of cases pending in the Ohio courts which deal with these issues. Two cases have reached the intermediate appellate courts,[121] both of which have been decided adversely to the open shop contractor. Appeals to the Ohio Supreme Court are expected.[122]

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[118] *See, e.g.*, 29 DEL. CODE ANN. tit. 29, § 6912(b) (1994); HAW. REV. STAT. § 104-2(d) (1994); N.M. STAT. ANN. § 13-4-11 (1995); R.I. GEN. LAWS § 37-13-7(a) (1995).

[119] OHIO REV. CODE. ANN. § 4115 (Baldwin 1995).

[120] CAL. LAB. CODE § 1773 (West 1989).

[121] Independent Elec. Contractors of Greater Cincinnati, Inc. vs. County of Hamilton, No. C-930640 (Ohio Ct. App., 1st Dist., Mar. 8, 1995); J.A. Croson Co. v. Central Ohio Joint Vocational School Dist., No. CA94-07-026 (Ohio. Ct. App., 12th Dist., May 30, 1995).

[122] Telephone Interview with Todd F. Palmer, Esq., counsel to plaintiffs, Emmons, Kegler, Brown, Hill & Ritter (Feb. 20, 1995 & Apr. 24, 1995).

In Ohio, the unions have argued that the purpose, manner of collection and disbursement of dues is a matter governed by federal labor policy and that the state "Little Davis-Bacon Acts" are preempted to that extent.[123] It has not always been clear exactly what type of federal labor preemption is intended. However, the Ohio courts now appear to have settled on *Garmon*[124] preemption as the principal rationale,[125] although the parties' briefs are full of references to numerous other theories of preemption and exemption.[126]

In truth, it is not easy to see why preemption is even an issue in this litigation. The state is not attempting to regulate dues check-off. It is not calling into question the underlying collective bargaining agreements. It is not adjudicating a dispute properly before the National Labor Relations Board (NLRB) or interfering in the zone left by Congress to the free play of economic forces. The state is simply attempting to define what counts as payment of prevailing wages for purposes of its own competitive bidding statutes. This is surely a process which is both

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[123] *See* Independent Elec. Contractors, No. C-930640 (Ohio Ct. App., 1st Dist., Mar. 8, 1995); J.A. Croson Co., No. CA94-07-026 (Ohio Ct. App., 12th Dist., May 30, 1995).

[124] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

[125] *See, e.g.*, Independent Elec. Contractors v. County of Hamilton, 101 Ohio App. 3d 580 (1995).

[126] Brief of Appellee J.A. Guy, Inc., Mechanical Contractors, J.A. Croson Co. v. J.A. Guy, Inc., No. 95CA10 (Ct. App. Ohio, 4th App. Dist.); Brief of Appellee United Ass'n of Journeymen and Apprentices, J.A. Croson Co. v. J.A. Guy, Inc., No. 95CA10 (Ct. App. Ohio, 4th App. Dist.).

innocuous and necessary. The line must be drawn somewhere for the guidance of contractors. Given the purposes of these statutes, the line certainly must be drawn so as to avoid counting kickbacks by employees. The only question is whether a 2 percent pay deduction for the industry fund falls on one side of the line or the other. There are many cogent arguments on both sides, but no real issue of federal labor policy. The union parties remain free to deduct as much as they will, just as the non-union contractor remains free to receive kickbacks. Neither, however, should expect credit toward payment of the prevailing wage under the present Ohio statute.[127]

In California, the arguments have been similar. The ABC attacked targeting in an administrative proceeding before the California Department of Industrial Relations (CDIR), complaining of the IBEW-NECA program.[128] In California, this plan is funded by union dues, a portion of which is allocated to a targeting trust fund. The Director of the CDIR eventually determined that he could not distinguish between "good dues" and "bad dues" without trespassing on federal labor preemption, apparently of the *Garmon* variety, although other types are also suggested.[129] Thus, CDIR could not enforce the anti-kickback provisions of the applicable California statute.[130] On the

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[127] OHIO REV. CODE ANN. §§ 4115.07, 4115.10 (Baldwin 1995).

[128] Letter from Lloyd W. Aubry, Jr., Director, Cal. Dep't of Indus. Relations, to Richard M. Freeman, Esq., Shepard, Mullin, Richter & Hampton, and others (Aug. 26, 1994) (on file with author).

[129] *Id.* at 3-4.

[130] *Id.* at 5-6 (discussing CAL. LAB. CODE § 1773).

other hand, CDIR agreed with ABC that wages paid back to contractors, by whatever route, could not be included in the wage base for purpose of calculating the prevailing wage.[131] Accordingly, CDIR is reevaluating its prevailing wage determinations with a view to reducing the wage base by the amount of the targeting contribution.[132] A union attempt to obtain judicial reversal has recently been preliminarily rejected.[133]

Again, the federal issue is illusory. States routinely characterize union dues for other purposes and have faced no insurmountable federal obstacle in doing so. For example, states decide issues such as: are union dues taxable to the employee, deductible by the employer, or neither for state income tax purposes?[134] Are such payments part of the wage base for state job training grant purposes? Part of income for public assistance means tests? Counted toward the average per capita wage for computing county revenue sharing grants? The answers may be very different, depending on the state and the purpose of the underlying legislation. However, in no case will the federal Cerberus awaken. It slumbers on, content that the states are simply going about their business and drawing necessary lines. The situation is no different in the case of job targeting.

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[131] *Id.* at 6-8.

[132] *Id.* at 8-9.

[133] Local Union No. 11 v. Aubry, No. 966400, Order Den. Pet. for Writ of Mandate (Cal. Super. Ct., County of S.F., Feb. 2, 1995).

[134] Perhaps the more interesting question is whether targeting payments are ordinary business income.

Although federal preemption is ultimately a red herring, the arguments should be visited briefly. *Garmon* preempts state regulation of activities which are arguably protected or prohibited by sections 7 and 8 of the NLRA.[135] This type of preemption is designed to protect the jurisdiction of the NLRB.[136] Although it is possible to argue that nearly anything involving a union is arguably protected by section 7 or section 8 of the NLRA, it does not really seem that the state statutes in question have any connection with the core values of the NLRA. State court actions under the state acts would seem to have even less true significance for the jurisdiction of the Board. At least since the *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*,[137] *Garmon* has not been applied mechanically or to matters of strong local interest, and preemption depends on the similarity of the state law dispute to the hypothetical NLRB charge.[138] Furthermore, dues check-off is governed by section 302 of the Labor Management Relations Act (LMRA),[139] which is not within the NLRB's enforcement jurisdiction.

The unions counter by citation to a string of cases, most of which involve attempted state regulation of dues check-off by direct legislation.[140] These cases are read for

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[135] 359 U.S. 236, 246 (1959).

[136] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 748 (1985).

[137] 436 U.S. 180 (1978).

[138] *Id.* at 197.

[139] 29 U.S.C.A. § 186 (West Supp. 1995).

[140] *See, e.g.*, USWA v. United States Gypsum Co., 339 F. Supp 302, 308 (N.D. Ala. 1972), *aff'd in part and rev'd in part*, 492

the propositions that dues check-off under section 302 is within the NLRB's competence and that state regulation is preempted. While there is nothing wrong with the unions' scholarship, the problems are historical and conceptual. Essentially all of the unions' authority was written before *Garmon* was reigned in by *Sears*, before *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n* announced a more carefully crafted and separate preemption doctrine for matters intentionally left unregulated,[141] and before the relationship between federally protected collectively bargained rights and independent state law rights had been ironed out.[142] The courts of twenty years ago had little to work with but *Garmon's* broad formula and a general idea that collective bargaining agreements could not be dictated by the state. Since that time, the importance of state interests has become better appreciated. Thus, for example, state

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F.2d 713 (5th Cir. 1974), *cert. denied*, 419 U.S. 998 (1974); SeaPAK v. Industrial Employees, 300 F. Supp. 1197 (S.D. Ga. 1969), *aff'd per curiam*, 423 F.2d 1229 (5th Cir. 1969), *aff'd*, 400 U.S. 985 (1971); State v. Montgomery Ward & Co., 233 P.2d 685 (Utah 1951), *cert. denied*, 342 U.S. 869 (1951); Shen-Mar Food Products, Inc., 221 N.L.R.B. 1329 (1976), *enforced as modified*, 557 F.2d 396 (4th Cir. 1977).

[141] *Machinists*, 427 U.S. 132, 147 (1976) ("[T]he crucial inquiry regarding pre-emption is . . . whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes.' ").

[142] *See, e.g.*, Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405 (1988) ("[I]f the resolution of a state law claim depends upon the meaning of a collective bargaining agreement, the application of state law . . . is pre-empted and federal labor law principles must be employed to resolve the dispute.").

employment standards legislation – such as Little Davis-Bacon legislation – is now held to be beyond the envelope of federal labor preemption.[143] Further, it is now better understood that the right to bargain collectively does not grant parties to a collective bargaining agreement a general license to enter into contracts that are illegal under state law.[144] It is therefore at least doubtful that *Garmon* would be applied in the same fashion to these facts today. *Machinists* analysis would be more appropriate and would almost certainly lead to a finding that the incidental and indirect effect of state prevailing wage legislation was not a forbidden intrusion by states on an area intentionally left free of regulation.

Conceptually, the older *Garmon* cases cited by the unions[145] are simply inapposite. The states of Ohio and California have no interest in regulating union dues,

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[143] Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724, 755 (1985). The same is apparently not true of ERISA. Perhaps the rule could be better stated with respect to the underlying values which *Machinists* and ERISA preemption seek to protect. Both preserve a free fire zone of deliberately unregulated conduct. It is certainly conceivable that a minimum labor standards law could intrude significantly enough into traditional self-help activities that it would be preempted (e.g. a law requiring time-and-a-half for striker replacements). However, an anti-kickback law of the Davis-Bacon type does not significantly threaten the right to economic self-help. *See also* Challenger Caribbean Corp. v. Union General de Trabajadores de Puerto Rico, 903 F.2d 857, 867 (1st Cir. 1990) (holding section 301 preemption does not apply).

[144] Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211-12 (1985).

[145] *See supra* note 140.

check-off, or collective bargaining. They are simply attempting to determine what should count as "wages" for their own purposes. In any case, if the area truly is preempted, then there is no bar even to naked kickbacks – a proposition unlikely to receive much credence in any court. Surely the state is entitled to protect its prevailing wage scheme from outright fraud.

The matter may also be looked at in another way. One difficulty, particularly with the CDIR's approach, is that it focuses on the wrong end of the process. CDIR has no need to pass on the legality of dues collection. How the money is acquired is immaterial. The point is that wages, however collected, are rebated to contractors in defiance of the state act. If this is unlawful under the California code, it is not immunized by collecting the targeted funds as union dues, as ERISA welfare fund payments,[146] or as charitable contributions. Thus the federal issue is not germane to the state statute and should not impede enforcement. Particularly when, as here, the state is announcing the terms under which its own money will be spent on its own projects,[147] the federal courts are unlikely to find federal labor preemption of any kind.

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[146] *Cf.*, Employee Staffing Services v. Aubry, 20 F.3d 1038, 1041-42 (9th Cir. 1994), in which the Director of CDIR took a somewhat different view of federal preemption. In the federal action, CDIR successfully maintained that running workers compensation funds through an ERISA trust did not result in preemption of California's workers' compensation law. *Id.* By the same token, any attempt to sterilize kickbacks by collecting them initially as "dues" should be ineffective.

[147] *Cf.*, *Boston Harbor*, 113 S. Ct. 1190 (1993).

In summary, litigation under the "Little Davis Bacon Acts" is at an early stage. At the present time, the most heavily litigated issue appears to be federal preemption. Although the unions are enjoying some degree of success on this issue, it remains to be seen what the eventual consensus will be. Federal Labor preemption doctrines, as currently understood, do not appear to preempt an action under the state prevailing wage laws.

C Antitrust Litigation

Since unions and unionized contractors must agree to any job targeting scheme, it is not surprising that the only substantial challenge to job targeting of private construction projects has been brought under to [sic] the antitrust laws. The *Phoenix Electric*[148] action was brought against a NECA job targeting program in Portland, Oregon. Although nominally a local matter, the suit has been a direct face-off between national NECA and national ABC. ABC argued that the NECA targeting program[149] violated the Sherman Act and constituted a conspiracy to exclude open shop electrical contractors from the Portland construction market.[150] NECA argued that the program was

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[148] Phoenix Elec. Co. v. National Elec. Contractors Ass'n, 861 F. Supp. 1498 (D. Or. 1994).

[149] The NECA program has been described at *supra* notes 43-57 and accompanying text.

[150] *Phoenix Electric*, 861 F. Supp. at 1504-05.

exempt from antitrust scrutiny under the labor exemptions.[151] The court agreed with NECA and granted summary judgment for the defendants.[152] The matter is presently on appeal to the Ninth Circuit.[153]

In order to evaluate the *Phoenix Electric* decision, it is necessary to outline the scope of labor's immunity from the antitrust laws. Labor organizations are usually exempt from the operation of the antitrust laws by both a statutory and a non-statutory exemption. The statutory exemption[154] operates to shield a union from liability for its own actions, "[s]o long as a union acts in its self-interest and does not combine with non-labor groups."[155] Thus, the union loses protection when it conspires with employers and suppliers to create a closed market[156] or when it conspires with one set of employers to destroy another.[157] The Ninth Circuit, in its decision *USS-POSCO Indus. v. Contra Costa Bldg. & Constr. Trades Council (POSCO)*,[158] noted that the statutory labor exemption has two prongs: the union must not conspire with a non-labor

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[151] *Id.* at 1507-08.

[152] *Id.* at 1503.

[153] *Phoenix Electric*, 861 F. Supp. 1498, *appeal docketed*, No. 94-35522 (9th Cir.).

[154] 15 U.S.C.A. § 17 (West 1973); 29 U.S.C.A. § 52 (West 1973).

[155] United States v. Hutcheson, 312 U.S. 219, 232 (1941).

[156] Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 810 (1945).

[157] United Mine Workers of America v. Pennington, 381 U.S. 657, 665-66 (1965).

[158] 31 F.3d 800 (9th Cir. 1994).

entity *and* it must pursue a legitimate goal.[159] Drawing heavily on a seminal law review article by Durie and Lemley,[160] the Ninth Circuit held that a union forfeits its statutory exemption not only when it conspires, but also when it does not act in its "legitimate"[161] self-interest.[162] "Whether the interest in question is legitimate depends on whether the ends to be achieved are among the traditional objectives of labor organizations."[163]

In addition to statutory immunity, a union's anticompetitive actions may also be immune from antitrust scrutiny under the non-statutory exemption. The primary purpose of the non-statutory exemption is to protect restraints incidental to collective bargaining agreements and other arrangements concerning "legitimate subjects of collective bargaining."[164] Many courts have agreed that a restraint should normally meet three criteria before

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[159] *Id.* at 807-08.

[160] Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 CALIF. L. REV. 757 (1992).

[161] The word "legitimate" does not appear in the original formula announced in United States v. Hutcheson, 312 U.S. 219, 232 (1941). The qualifier, however, was introduced in H.A. Artists & Associates, Inc., v. Actors' Equity Ass'n, 451 U.S. 704, 721 (1981), and appears to have become part of the lexicon.

[162] *POSCO*, 31 F.3d at 807-08.

[163] *Id.* at 808.

[164] National Ass'n of Women's & Children's Apparel Salesmen, Inc., v. FTC, 479 F.2d 139, 144 (5th Cir. 1973), *cert. denied*, 414 U.S. 1004 (1973); *See also*, Connell Constr. Co. v. Plumbers, Local 100, 421 U.S. 616 (1975); *In re* Detroit Auto Dealers Ass'n, Inc., 955 F.2d 457 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 461 (1992).

this exemption will be applied: (a) the restraint must primarily affect only the parties to the agreement; (b) it must concern a mandatory subject of bargaining; and (c) it must be the product of bona fide arm's-length bargaining.[165]

In *Phoenix Electric*, the district court found that the defendants enjoyed both types of labor immunity.[166] With regard to statutory immunity, it found that the unions were attempting to maximize work for their members and were therefore acting in their "legitimate self-interest."[167] Such a global and imprecise view of "legitimate self-interest" is inconsistent with the specific inquiry suggested by *POSCO*. In rare cases, a particular union local is dominated by employer or criminal interests and ceases to function as a union. Absent such pathological cases (which can be dealt with by other law) a union regularly acts to maximize work. The question asked by *POSCO* is whether the union's *legitimate* self-interest includes the boycott in question, not whether the defendant is acting as a union.[168] Furthermore, the characterization of the union's actions is meaningless with respect to the

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[165] This test was first formulated in Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). It has been widely adopted by other courts. *See, e.g., In re* Detroit Auto Dealers, 955 F.2d 457, 463; Powell v. National Football League, 930 F.2d 1293, 1297 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991); Continental Maritime of S.F., Inc. v. Pacific Coast Metal Trades Dist. Council, 817 F.2d 1391, 1393 (9th Cir. 1987).

[166] 861 F. Supp. at 1502.

[167] *Id.* at 1509.

[168] 31 F.3d at 808-09.

employer defendants. Indeed, the statutory exemption is available only to labor organizations.[169]

The *Phoenix Electric* court also found that the second prong of the statutory exemption was met.[170] It held that the job targeting program merely acted as a wage concession to union employers.[171] It was not the type of "combination" between unions and employers that ought to fall outside the exemption.[172] If it were, the court argued, any collective bargaining agreement would take a union out of the statutory exemption.

Not surprisingly, the court cites no authority for this proposition.[173] The entire justification for the nonstatutory exemption lies in the fact that the statutory exemption does in fact fail whenever a union engages in collective bargaining. A collective bargaining agreement is, by its very nature, a combination between a labor and a non-labor entity. It may be otherwise exempt. It may not be an unreasonable restraint, but a combination it remains. There is no justification for getting courts into the business of separating "good" and "bad" collective bargaining agreements under the antitrust acts. This is precisely the kind of interference with federal labor policy that the exemptions were designed to prevent.

Finally, the *Phoenix Electric* court found that the NECA targeting scheme was protected by the

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169 *In re* Detroit Auto Dealers, 955 F.2d at 464-65.

170 861 F. Supp. at 1509.

171 *Id.*

172 *Id.*

173 *Id.*

nonstatutory exemption.[174] Application of the nonstatutory exemption is a closer call. The court faithfully parroted the three standard criteria for exemption,[175] but applied them in a nonstandard manner. Briefly, the court found that the restraint primarily affected the parties to the contract, because any contractor was free to sign up with the union.[176] This conclusion cannot stand, because the question is the effect on non-parties, not the ease with which persons can become parties. The court also concluded that the restraint concerned a mandatory subject of bargaining, because wages are a mandatory subject.[177] This may well be correct with respect to selective wage reductions, but cannot be true as to wage subsidies or rebates that are not mandatory subjects of bargaining.

What the court actually seems to have done is to conclude that the restraint was not unreasonable under the circumstances. In this, the court could well be correct. To say that a practice is not exempt from antitrust scrutiny is not to say that it is an antitrust violation. The *Phoenix Electric* plaintiffs would face a formidable burden to prove unreasonableness even if there were no exemption. However, it does appear that the better course would have been to permit the parties to try the case on its merits, rather than attempt to dispose of it by way of summary judgment.

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[174] *Id.* at 1511.

[175] *Id.* at 1510.

[176] *Id.*

[177] *Id.*

Interestingly, the magistrate judge who initially granted the motion appears to have recognized this problem. The magistrate's recommendation includes a substantial discussion of the reasonableness of the restraint.[178] Unfortunately, this discussion reveals a number of fact issues for trial, and, in any case, this portion of the magistrate's recommendation was rejected by the District Judge.[179]

D The Path Not Taken – NLRA Section 302[180]

The NLRA section 302, as amended, prohibits payments of money or other things of value by any employer to a labor organization,[181] as well as the solicitation of any such payment[182]. A violation of the general prohibition is a felony, or is enjoinable in a private civil action, unless the payment falls within certain enumerated exceptions.[183] For example, section 302(c) permits payments for medical or pension benefits, provided that the payment is made to a trust fund.[184] The trust must meet

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[178] *Phoenix Electric*, 861 F. Supp. at 1511-15.

[179] *Id.* at 1503.

[180] 29 U.S.C.A. § 186 (West 1978 & West Supp. 1995).

[181] 29 U.S.C.A. § 186(a) (West 1978).

[182] 29 U.S.C.A. § 186(b) (West 1978 and Supp. 1995).

[183] 29 U.S.C.A. § 186(d) (West 1978 and Supp. 1995); 29 U.S.C.A. § 186(e) (West 1978).

[184] 29 U.S.C.A. § 186(c)(5) (West 1978 and Supp. 1995).

various requirements, notably including joint administration by an equal number of union and employer representatives.[185] The fund must also be held in trust solely for the benefit of its beneficiaries, in accordance with a written agreement, and be audited annually.[186] Payroll deduction for union dues or payments to benefit trusts is permitted.[187] Section 302, however, requires written employee authorization for all deductions from paychecks.[188]

The restrictions written into section 302(c) resulted from the World War II and post-war strikes led by John L. Lewis, the late president of the United Mine Workers (UMW), and the initial, history-making welfare funds that he won in 1946 after negotiations with the then Secretary of the Interior, Julius Krug, who was administering the coal mines after the federal government seized them to end a series of strikes.[189]

> The Lewis-Krug agreement provided miners with a welfare and retirement fund jointly supervised by the union and the government [as the "owner" of the seized mines] . . . [financed

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[185] *Id.* Pub. L. No. 91-86 (1969), added employee scholarship and child care centers to the list of permissible fringe benefits that could be legally provided under the section restrictions, but excepted such benefits from required bargaining status. Pub. L. No. 93-95 (1973), added legal services to the permissible list, with limitations on the use of such services.

[186] 29 U.S.C.A. § 186(c)(5).

[187] 29 U.S.C.A. § 186(c)(4) (West Supp. 1995).

[188] *Id.*

[189] MELVYN DUBOFSKY & WARREN VAN TINE, JOHN L. LEWIS. A BIOGRAPHY 461 (1977).

> by] a five-cent royalty on every ton of coal mined. A second medical and health fund was established, to be administered by the union and financed by the companies depositing moneys previously deducted from the miners' wages for company run medical and health programs. . . . [190]

The second, union-administered fund, combined with the antipathy for Lewis and the coal strikes, aroused the concern of Congress.[191] Section 302 was the compromise result between those who would outlaw such arrangements or leave them to free, non-required collective bargaining and those who would not regulate them.[192]

It is quite possible that the usual job targeting scheme of the wage subsidy or rebate type violates section 302(c). Usually such funds are collected from employers, either as assessments or as "dues" deducted from the paychecks of employees. If union employers are directly paying the union to run a wage subsidy fund, this practice may well violate section 302, unless the fund complies with the structural requirements of section 302(c), including keeping the funds in a jointly trusteed trust. In fact, even in the unlikely event that the union could comply with structural requirements of section 302(c), the fund would not serve any of the recognized purposes for which such a trust may be used. Further, such a fund, by definition, assists the contractors. Accordingly, it could not be said

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190 *Id.*

191 *Id.* at 472.

192 *Id.*

to serve the "sole and exclusive benefit of the employees."[193]

If, on the other hand, the payments are made by union employees as "dues," then the analysis is different. A wage checkoff is permitted only for union dues.[194] A union cannot avoid compliance with section 302 by recharacterizing a payment as dues.[195] Thus, it is at least unclear whether a job targeting fund can comply with section 302 under any state of facts.[196]

Federal courts may enjoin payments to labor organizations if the payments violate section 302.[197] However, an attempt by an open shop contractor to enjoin the checkoff of "dues" paid by the employees of *another* contractor entails some significant standing problems. It is at least certain to raise judicial eyebrows. A more

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[193] 29 U.S.C.A. § 186(c)(5). The CDIR decision, *supra* note 128, seems to assume that the union "trust fund" used in the California scheme, complies with section 302. This simply cannot be the case. The CDIR decision itself notes that the funds are (a) allocated to contractors, and (b) in the sole discretion of the union. Accordingly, it appears to a legal certainty that the fund is neither jointly administered nor used for the exclusive benefit of employees.

[194] 29 U.S.C.A. § 186(c)(5) (West 1978).

[195] *See* Master Insulators of St. Louis v. Local No. 1, 925 F.2d 1118, 1124 (8th Cir. 1991). *See also* Building & Constr. Trades Dep't v. Reich, 815 F. Supp. 484, 491 (D.D.C. 1993) (affirming the Secretary of Labor's determination that "dues" do not extend to job creation schemes under the Davis-Bacon Act).

[196] *Cf.* Local 3 v. Masonry & Tile Contractors, 136 L.R.R.M. (BNA) 2319 (D. Nev. 1990).

[197] Local 144 Nursing Home Pension Fund v. Demisay, 113 S. Ct. 2252, 2257 (1993).

productive approach may be to take advantage of the fact that section 302 violations are also RICO "predicate acts."[198] Civil RICO actions are not without their own difficulties. However, since section 302 is an enumerated predicate act, labor preemption will not be among these difficulties.

IV

Conclusion

As pointed out in the introduction, construction labor unions have steadily lost ground to the open shop. Conventional organizing techniques have proven ineffective to overcome market forces. Job targeting is one of several novel strategies developed by the unions to overcome economic realities. It has been relatively effective in regaining some lost ground, particularly for small and medium-sized construction.

The legal analysis of job targeting is at a very early stage. The contractors have had some success with respect to public projects under the Davis-Bacon Act. However, the unions have won most of the early rounds with respect to state-funded and privately financed projects. In these latter cases, there is a serious question whether the labor organizations can continue to hold the legal high ground. Specifically, the federal labor preemption and labor exemption issues require at least a more thorough exposition. None of the conventional labor preemption doctrines seem a good fit, nor do either of

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[198] 18 U.S.C.A § 1961(1)(C) (West 1978 and Supp. 1995).

labor's antitrust immunities. In addition, targeting may be subject to attack under other theories, such as NLRA section 302.

At the very least, it would be beneficial to have a few of these test cases tried on the merits, so that the factual background necessary for accurate application of these various defenses could be more fully explored. The current crop of decisional law is long on principal, but rather short on critical factual detail. Quite possibly, some targeting techniques, for example, project agreements which reduce costs for a particular job, are members of the rare family of successful and beneficial labor-management cooperative efforts. Equally likely, other techniques (direct contractor subsidies, for example) are malignant growths that virtually invite corruption and abuse. Legal theory cannot distinguish between the two genera without a more serious factual inquiry by the judiciary. It is hoped that this study will encourage more judicial decisions on the merits.